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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

OCTOBER 25, 1904—MARCH 10, 1905

BY
W. W. CORNWALL

VOLUME IX
BEING VOLUME CXXVI OF THE SERIES

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JUDGES OF THE COURTS

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

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First District—H. BANK, JR., Keokuk.

Second District—ROBERT SLOAN, Keosauqua; F. W. EICHELBERGER, Bloomfield; M. A. ROBERTS, Ottumwa; C. W. VERMILION, Centerville.

Third District—H. M. TOWNER, Corning; HIRAM K. EVANS, Corydon.

Fourth District—GEORGE W. WAKEFIELD, Sioux City; F. R. GAYNOR, Le Mars; J. F. OLIVER, Onawa; WILLIAM HUTCHINSON, Alton.

Fifth District—J. D. GAMBLE, Knoxville; J. H. APPEGATE, Guthrie Center; EDMUND NICHOLS, Perry.

Sixth District—JOHN T. SCOTT, Brooklyn; BYRON W. PRESTON, Oskaloosa; W. G. CLEMENTS, Newton.

Seventh District—ARTHUR P. BARKER, Clinton; A. J. HOUSE, Maquoketa; D. V. JACKSON, Muscatine; JAMES W. BOLLINGER, Davenport.

Eighth District—O. A. BYINGTON, Iowa City.

Ninth District—A. H. MCVEY, Des Moines; HUGH BRENNAN, Des Moines; W. H. MCHENRY, Des Moines; JAS. A. HOWE, Des Moines.

Tenth District—A. S. BLAIR, Manchester; FRANKLIN C. PLATT, Waterloo.

Eleventh District—J. R. WHITAKER, Boone; W. D. EVANS, Hampton; J. H. RICHARD, Webster City.

Twelfth District—J. F. CLYDE, Osage; C. H. KELLEY, Forest City; CLIFFORD P. SMITH, Mason City.

Thirteenth District—L. E. FELLOWS, Lansing; A. N. HOBSON, West Union.

Fourteenth District—W. B. QUARTON, Algona; A. D. BAILIE, Storm Lake.

Fifteenth District—A. B. THORNELL, Sidney; N. W. MACY, Harlan; ORVILLE D. WHEELER, Council Bluffs; W. R. GREEN, Audubon.

Sixteenth District—F. M. POWERS, Carroll; Z. A. CHURCH, Jefferson.

Seventeenth District—G. W. BURNHAM, Vinton; OBED CASWELL, Marshalltown.

Eighteenth District—WM. G. THOMPSON, Marion; BEN. H. MILLER, Anamosa; J. H. PRESTON, Cedar Rapids.

Nineteenth District—FRED O'DONNELL, Dubuque; MATTHEW C. MATTHEWS, Dubuque.

Twentieth District—JAMES D. SMYTH, Burlington; W. S. WITHROW, Mt. Pleasant.

SUPERIOR COURTS.

Cedar Rapids—JAMES H. ROTHROCK.

Council Bluffs—G. H. SCOTT.

Keokuk—W. L. McNAMARA.

Ochwein—ERNEST L. ELLIOTT.

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HORACE E. DEEMER, *Chief Justice*, Montgomery County.

JOHN C. SHERWIN, Cerro Gordo County.*

EMLIN McCLAIN, Johnson County.

SILAS M. WEAVER, Hardin County.

SCOTT M. LADD, O'Brien County.

CHARLES A. BISHOP, Polk County.

OFFICERS OF THE COURT.

CHARLES W. MULLAN, *Attorney General*, Blackhawk County.

JOHN C. CROCKETT, *Clerk*, Hardin County.

W. W. CORNWALL, *Reporter*, Clay County.

* The term of Chief Justice Deemer expired December 31, 1904, being succeeded by himself, and thereupon, Mr. Justice Sherwin became Chief Justice by order of rotation.

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, SEPTEMBER TERM, A. D. 1904
AND IN THE FIFTY-EIGHTH YEAR OF THE STATE.

THE IOWA RAILROAD LAND Co., Appellee, v. MARY FEHRING
and FRED MAYER, Appellants.

Limitation of actions: WHEN STATUTE COMMENCES TO RUN. Where
1 a railway company has perfected its title to land under a grant and
nothing remains but to receive a certificate from the government,
- the statute of limitations will commence to run in favor of one
claiming an adverse interest at the date such title was perfected.
but in the absence of evidence to the contrary, the company will be
presumed to have acquired title on the date of the certificate, and
the statute will run from that time.

Estoppel: REPRESENTATIONS OF AGENT. The representations of an
2 agent as to title, who is authorized simply to sell, will not work
an estoppel where there is no claim that he knew the purpose of

the inquiry, or that his response was to be relied upon, or that the information was given in bad faith.

Adverse possession: LACHES: ESTOPPEL. Where one under a quit-
3 claim deed from the supposed owners of the swamp land title, has in good faith entered upon the land, improved and occupied it for a period of ten years, a railway company in fact owning the same but having neglected for more than ten years to procure a patent or assert its rights knowing of the adverse claim and occupancy, is estopped by its laches from thereafter claiming the land.

Appeal from Greene District Court.—HON. F. M. POWERS,
Judge.

TUESDAY, OCTOBER 25, 1904.

THE plaintiff alleged ownership of the forty acres of land in controversy since June 14, 1901; that defendants are in possession, which they have refused to yield and prayed judgment of ejectment and for damages. An abstract of title was attached, from which it appears that a certificate of title was issued to the Cedar Rapids & Missouri River Railroad Company June 13, 1901, under an act of Congress approved May 15, 1856 (11 Stat. page 9, chapter 28), and an amendment thereto approved June 2, 1864 (13 Stat. page 95, chapter 103), and that prior thereto — December 8, 1884 — that company had conveyed to the plaintiff all the interest it then had or might thereafter acquire.

The defendant Fehring admitted that she declined to yield possession of the land, and in the second division of her answer averred ownership thereof, and that she had been in the open, notorious, and exclusive possession thereof since 1889, had paid the taxes thereon since then, and fenced the land and reduced part of it to cultivation; that such occupancy had been adverse to plaintiff and all others, and with its knowledge and acquiescence. In the third division it is said that one Lawrence was agent for plaintiff for the sale of its lands in Greene county in 1889, and as such sold her the adjoining tract; that upon inquiry he informed her that the

land in controversy did not belong to the company, but was swamp land; and that, relying on this statement, she purchased the title inuring under the swamp-land grant, paying therefor the sum of \$160; that she then made valuable improvements thereon, and has since occupied the same — all of which occurred with the knowledge of the plaintiff, and with its acquiescence and consent, by reason whereof it is asserted that plaintiff is estopped from laying claim to the land. She prayed that the cause be transferred to the equity side of the calendar, and that her title be quieted. Her motion to transfer to the equity side of the docket was sustained. The plaintiff then filed a demurrer, the first ground of which was general, and the second ground that the answer, in setting up adverse possession, “in no manner denied that the plaintiff’s title from the United States accrued and was acquired at the time set forth in plaintiff’s petition within ten years from the commencement of this action.” The demurrer was sustained, and the cause sent back to the law side of the calendar. The defendant then amended by adding as a fourth division that since filing her answer she had filed with the General Land Office at Washington, D. C., an application for the cancellation of plaintiff’s certificate of title; that she believed the same to have been procured by fraud not discovered by her until 1903, and that she had also assailed certain proceedings before the Land Department. As a fifth division she alleged, in addition to the above, that the proceedings before the Land Department of the government were begun in 1884, and plaintiff allowed the same to remain undisposed of until June 14, 1901.

When official action was taken on the granting of said certificate referred to in plaintiff’s petition; and that during all of said time after the 2d day of May, 1889, up to and including the date said certificate was issued, as aforesaid, this defendant was in the actual possession of said real estate, claiming to be the owner thereof under and by virtue of a deed of conveyance, as stated in her original answer

filed in this cause, reference to which is hereby had, and the same is made a part hereof, and permitting this defendant during all of said time to remain in the quiet and undisturbed possession and enjoyment of said premises, and allowing her to make improvements thereon and to pay the taxes levied and assessed against the same, together with any and all other acts which an owner of real estate had and usually exercised with reference thereto; and during all of said time the plaintiff was fully cognizant of the fact that the defendant was so acting, without any knowledge or notice of the proceedings then being carried on in such negligent and slothful manner by the plaintiff; and by reason of said negligence, slothfulness, and laches the plaintiff is now and forever estopped from having, asserting, or pretending to have any claim, demand, right, title, or interest in, to, or concerning any part of the aforesaid real estate.

In the sixth division it is averred that in said proceedings it was claimed that the land was not within the meaning of the swamp-land act, and that it was within the limits of the grant to the railroad company, and defendant alleged that both these contentions were false and fraudulent; that the Land Department in fact found that the land was within the indemnity limits, but that the hearing and finding was without notice to this defendant, and therefore was unauthorized. She again prayed that the cause be heard as an equitable action, and title quieted in her. The defendant Meyer averred that he was in possession as tenant of Fehring, and adopted her answer, as amended, as his own. To the answer, as amended, the plaintiff interposed a general demurrer, which was sustained, and judgment of ejectment entered for a stipulated amount of damages. The defendants appeal.—*Reversed.*

Owen Lovejoy and J. A. Henderson, for appellant.

Chas. A. Clark and Son and Wm. G. Clark, for appellee.

LADD, J.—According to the petition the plaintiff acquired title to the forty acres through a conveyance executed

to it December 18, 1884, by the Cedar Rapids & Missouri Railroad Company, to which the government certified the land June 14, 1901, by virtue of an act of Congress approved May 15, 1856, and an amendment thereto approved June 2, 1864. Action for possession was begun in September, 1902, against Mary Fehring, to whom James Callanan and J. C. Savery had executed a quitclaim deed in 1889. To her grantors the American Emigrant Company had conveyed in 1875, and to it Greene county twelve years previous. Meyer is merely the tenant of Fehring, who has been in the open, notorious, and exclusive possession of the land since 1889. This was with color of title. *Tremaine v. Weatherby*, 58 Iowa, 615. As will be observed, the legal title did not pass from the United States until the execution of the certificate to the railroad company in 1901, and it is elementary that the statute of limitations does not run against the government. *Young v. Charnquist*, 114 Iowa, 116; *Wilber v. Ry. Co.*, 116 Iowa, 65. Possibly the company may have earned the land prior to that time; and if its title was perfect, and nothing remained for it to do save receive the certificate of title from the government, it is not perceived why the statute of limitations should not begin to run when entitled to such certificate. See *Cady v. Eighmey*, 54 Iowa, 615; *Steele v. Boley*, 6 Utah, 308 (22 Pac. Rep. 311); *Carroll v. Patrick*, 23 Neb. 834 (37 N. W. Rep. 671); *Nichols v. Council*, 51 Ark. 26 (9 S. W. Rep. 305, 14 Am. St. Rep. 20). In such a case the government retains but the naked legal title, while the beneficiary of the grant is the real owner. But nothing of the kind is suggested in the division of the answer setting up the plea of adverse possession, and in the absence thereof the ownership must be presumed to have been acquired with the execution of the certificate. The averment of the petition that the plaintiff procured the title in 1901 was in no way obviated, and as prior thereto it was in the government, the statute of limitations could not

1. LIMITATION
OF ACTIONS:
when statute
commences
to run.

have begun to run until then, and the demurrer to this division of the answer was rightly sustained.

II. The defendant also pleaded by way of estoppel that in negotiating for an adjoining forty acres of land of plaintiff through its agent, one Lawrence, she inquired who

2. ESTOPPEL:
representa-
tions of
agent.

owned the forty acres in controversy, and was informed by him that it did not belong to the plaintiff, but was swamp land. In reliance on such information she purchased it of Callanan and Savery at a cost of \$160. The only averment with reference to the agent's authority contained in the answer is that he "was agent for the sale of their lands in Greene county, Iowa." From the mere agency to sell power to waive claim of title is not to be inferred, and the most that he was authorized to say was that he had not been directed to sell. Besides, there is no allegation that the agent was advised of the purpose of the inquiry, or that plaintiff was intending or likely to rely upon his response, or that this was made in bad faith. In these circumstances the reply cannot be made the basis of a plea in estoppel. *Kirchman v. Standard Coal Co.*, 112 Iowa, 668; *Near v. Green*, 113 Iowa, 647.

III. In the fifth division, added by way of amendment to the petition, the defendant averred that proceedings were instituted before the Land Department of the govern-

3. ADVERSE POS-
SESSION:
laches; es-
toppel.

ment in 1884 to determine whether the land in controversy was of such character as to pass under the swamp-land grant, and whether it was within the railroad grant; that in 1886 it was held to be within the latter grant, and not to be "swampy;" that the decision was procured by fraud, and that she had applied to the Land Department to have it set aside; that, in any event, the plaintiff allowed the proceedings to remain undisposed of and without attention on its part or on the part of the government from that time until June 14, 1901; that from 1889 the defendant had been in the actual possession of said land, claiming ownership thereof, improving

the same, and paying taxes thereon, without knowledge or notice of said proceedings, and that all of them were known to the plaintiff. It is averred that "by reason of said negligence, slothfulness, and laches" the plaintiff is now estopped from claiming said land. We think this presents a good defense.

One person ought not to take advantage of another's ignorance in the manner alleged. According to the answer, for more than ten years the plaintiff has known that defendant was in possession and asserting title to the land; that during that time she had been improving the same, and so acting in utter ignorance of its claim, or of the proceedings instituted by it to procure title; and yet it had made no objection thereto, and had put forth no effort whatever to perfect its claim to the land. The case in its facts is stronger than *Bullis v. Noble*, 36 Iowa, 618, in that the defendant was conscious of its claim; but possibly weaker in that it had no legal title to assert. But, if the allegations are to be accepted as true, as they must be on demurrer, its omission to acquire title was due to its own inattention to and neglect of its affairs. If nothing had been done in the intervening twelve years, its claim of title was as complete in 1889 as immediately before the certificate issued. In other words, it must have been the real owner, though the naked title continued in the government. We see no reason why the doctrine of estoppel should not apply in such a situation as effectually as where the legal title had passed. If the plaintiff, as the real owner, permitted the improvements under claim of right without objection on its part, though having full information of the claim and what was being done, it ought not now to be permitted to take a position inconsistent to its former attitude to the defendant's prejudice. True, the defendant charged that the decision of the Land Department was procured by fraud, but this does not affect the applicability of the doctrine of estoppel, for, if the circumstances were such as to prohibit the assertion of a

valid title, one ought not in a like situation to be allowed to take advantage of a claim based on fraud. In view of our conclusion, we need not inquire whether the plea of laches was sufficient. But see *Young v. Hanson*, 95 Iowa, 717; *Bourne v. Ragan*, 96 Iowa, 566; *Young v. Snell*, 115 Iowa, 32; *Young v. Charnquist*, 114 Iowa, 116.—*Reversed*.

CORA M. BOOTH, Administratrix of the Estate of FAY BOOTH, Deceased, Appellant, v. THE UNION TERMINAL RAILWAY COMPANY.

Railroads: TRESPASSERS: LICENSEES. Where the employes of a packing house company have for years, with the knowledge of the railway company, been accustomed to cross its switch tracks in passing from one building to another about their work, and the railway company has offered no objection or obstruction to such use, it will be held to have consented thereto, and one of such employes killed while so crossing its tracks was not a trespasser but a licensee.

Contributory negligence: EVIDENCE. In an action for the death of a packing house employe struck by a passing car while crossing defendant's tracks in going from one building to another, the evidence is reviewed and held that he was not guilty of contributory negligence as a matter of law, in not using a crossing or in failing to look and listen for an approaching car, before going onto the tracks.

Appeal from Woodbury District Court.—HON. G. W. WAKEFIELD, Judge.

THURSDAY, OCTOBER 27, 1904.

SUIT to recover damages for the death of Fay Booth. There was a directed verdict for the defendant, and from a judgment thereon the plaintiff appeals.—*Reversed*.

J. L. Kennedy, E. A. Morling, and F. C. Davidson, for appellant.

Charles A. Dickson and T. F. Bevington, for appellee.

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SHERWIN, J.—The deceased was about eighteen years old at the time of his death, and was then, and for several days previous thereto had been, in the employ of the Cudahy Packing Company in Sioux City. The plant of this company consists of a group of buildings separated by an alley several hundred feet in length running north and south. The killing and packing building, in which the deceased worked, was on the west side of the alley, and the timekeeper's office and the general office were at some distance apart on the east side of the alley. Extending the entire length of the alley, and near the center thereof, was the main switch track used by the defendant for the purpose of reaching the Cudahy plant and the Armour plant, which was situated some distance south of the Cudahy plant. Abutting the alley in front of the east row of buildings was a loading platform about three feet high running from the room occupied by the timekeeper south several hundred feet to the general office. There was also a platform of nearly the same length in front of the west row of buildings. Near the north ends of these platforms there was a sufficient plank crossing connecting them. South of this crossing, and on either side of the main switch track, there was a track immediately in front of the platform. There were also two tracks north of the crossing, similarly situated. These side tracks did not, however, extend over the crossing in question, which was at grade where it crossed the track. The killing and packing building or room was south of this crossing and north of the general office. The deceased, with two fellow workmen, left the building together a little before 6 o'clock in the afternoon, for the purpose of reporting their time at the general office, coming out of the building through the hide cellar door towards the loading platform. Immediately in front of this point two cars, coupled together, were standing on the track, the north one of the two being an offal car and the south one an ordinary box car. Upon reaching the platform they stopped and looked to the north for a moment, and

then walked south to a point a couple of feet south of the south end of the box car, where they left the platform to cross the tracks. The other two were ahead of the deceased, and crossed safely, but just as he stepped towards the main track he was struck and killed by one of the defendant's trains, running south at the rate of eighteen or twenty miles an hour. The engine was pushing one box car and drawing several others, and no alarm was sounded as the train went through the alley. One of the defendant's employes was standing on the top of the forward car, but he was not looking ahead of the train. A motion to direct a verdict for the defendant was made and sustained at the close of the plaintiff's evidence, and we have two questions for determination: First, was the deceased a trespasser? and second, if not, was he guilty of contributory negligence? The court sustained the motion on the latter ground.

A thousand or more men were employed in and about the Cudahy plant, and had been so employed a long time prior to the accident in question. Approximately one-half of the employes worked on the west side of these tracks, and each day when they quit work it was their custom, required by the rules of the Cudahy Company, to report their time either at the timekeeper's office or at the general office, depending upon the time they reported. The evidence showed that these employes, as well as those working on the east side of the tracks, were, and had been for years, in the habit of crossing the tracks at all points along the alley between the buildings; that such practice was more common than the use of the crossing at the north ends of the platforms; that this practice was fully known to the defendant's employes during all of the time, and that no objection had ever been made thereto by the defendant. The tracks were laid on the surface of the ground, and between them and between the rails of each cinders had been put in and leveled off, so that the entire surface of the alley between the buildings was level and smooth.

1. TRESPASSERS:
licensees.

In *Clampit v. C., St. P. & K. Ry. Co.*, 84 Iowa, 71, the plaintiff, in going back and forth between his home and his work, crossed the defendant's tracks on a footpath much used by the public, and which was just at the foot of a high bank where a stairway had been built by persons using such crossing. It was contended in that case that the plaintiff was a trespasser, and not entitled to recover, but we held otherwise, and said:

There were no fences along the road, and nothing to prevent all persons desiring to do so crossing the road freely. The defendant and the railroad company owning the track, or either, had in no manner forbidden the crossing of the track by footmen, and had thrown no obstacles in their way. The fact that the place at the stairs was used as a crossing by pedestrians, who also crossed at other places near by, was known by the employes of the defendant, and by the engineer who operated the engine which struck the plaintiff. The stairway and the ties across the ditch, as well as the path made by footmen, prominently advertised the place as a crossing used by pedestrians. No engineer or fireman passing along the tracks at that place with his eyes open, in the exercise of reasonable watchfulness and care, could have failed to see these indications of the footpath, and to understand therefrom that it was used by pedestrians, if he possessed ordinary intelligence. The defendant and the railroad company owning the track, having through their employes and officers knowledge of the use of the footpath crossing, and having made no objections thereto, nor erected fences, walls, or other obstructions to such use, will be presumed to assent to it; thus giving all who use the crossing license therefor. The plaintiff, therefore, was not a trespasser upon the railroad track, but is entitled to all the rights and protection of one rightfully upon it with the license of the defendant.

This case was followed in *Thomas v. C., M. & St. P. Ry. Co.*, 103 Iowa, 649, where a child was injured on the defendant's track, where the public was accustomed to travel with the knowledge of the defendant. After quoting from the *Clampit Case*, it was said:

This language applies as well to the facts in the case at bar. Here was an almost constant use of this track. Here were well-defined footpaths, and a ladder in use for years for the purpose of reaching the track. The track repairers knew the ladder was there. The roadmaster had actual knowledge of it. The superintendent had once, at least, been where, if he used his eyes, he must have seen it. It was in plain view of all the train operatives; * * * and, with the fact undisputed of the use of the ladder, paths, and track for years without objection from the defendant or any of its employés, all these and other facts would warrant a finding by the jury that the use of the track was by the consent of the defendant, and therefore the child * * * was not a trespasser.

We again approved the rule in *Scott v. St. L., K. & N. W. Ry. Co.*, 112 Iowa, 54, and in *Edington v. B., C. R. & N. R. Co.*, 116 Iowa, 410. The basis of these footpath decisions is that the use of the railroad tracks was so common and so well defined that the companies were charged with knowledge of such use, and making no objections or obstruction thereto, were presumed to assent to it.

The instant case presents to our minds much stronger grounds for applying the rule thus announced than do any of the cases cited. Here the Cudahy buildings were arranged for the purpose of having switching facilities between them, and the tracks were laid through the alley for their accommodation. The buildings extended many hundred feet on each side of the tracks, and throughout the entire length they were occupied by the employés of the packing company, all of whom engaged on the west side of the tracks, at least, were required to cross the tracks at some time during the day. That they would cross at the point most convenient for them, rather than walk to the plank crossing, several hundred feet away, might well have been presumed by the defendant, in the absence of a physical demonstration that such was in fact the case. But for two years, at least, before the accident in question, these hun-

dreds of men had crossed and recrossed these tracks daily with the full knowledge of the defendant. When there was snow on the ground many well-defined paths crossed the tracks, but we do not deem this a circumstance of great weight because of the location and purpose of the tracks and the well established fact that the men crossed at all points between the buildings. It is the knowledge of the constant use of the tracks that binds the railroad company, and when it appears that such use is at all points along its tracks for several hundred feet the case falls clearly within the rule of the cases cited. While a railroad company is not ordinarily required to look out for persons who may cross its tracks at points where there is no well-defined use thereof for such purpose by the public, it cannot be said as a matter of law that the defendant was not required to be on the lookout in this case. *Baltimore & Potomac R. Co. v. Cumberland*, 176 U. S. 232 (20 Sup. Ct. 380, 44 L. Ed. 447).

The cases cited on this branch of the case by the appellee are based so largely upon the facts of each particular case that we will not extend this opinion for the purpose of reviewing them. In many of the cases the injured person was walking upon the railroad track, and in *Bryson v. C., B. & Q. Ry. Co.*, 89 Iowa, 677, we held that there was a distinction between walking on the track and crossing the same. In *Wagner v. Chicago & N. W. Ry. Co.*, 122 Iowa, 360, we held that the implied invitation to the public to use well-defined cinder paths provided for use as ways excluded an implied invitation to walk elsewhere, and therefore the defendant had the right to assume that the public would confine itself thereto. We reach the conclusion that the deceased was not a trespasser upon the defendant's track.

The two men who left the killing and packing house with the defendant were Dave Brodigan and John Hanesuer.

2. CONTRIBUTORY NEGLIGENCE: evidence. Brodigan testified that both he and the deceased looked north for a moment or two when they first reached the platform, and that there were no cars

moving on the tracks in that direction; that the three of them then went south on the platform about thirty-five feet to the south end of the box car, where they left the platform, and started across the tracks, he ahead, and the deceased behind; that just as he was about to leave the platform a friend on the east platform called to him to "hurry up, and beat Wells"; that he then jumped and started to run, and did not look for a train, or see or hear the one approaching from the north. Hanesuer followed Brodigan across the tracks, and both arrived safely on the other side. It was shown that the deceased did not again look north, nor did he look south, as he stepped by the end of the car and upon the track where he was struck. Just as he was stepping upon that track his peril was noticed by co-employés on the east platform, who called to him. He looked up, but in the same instant the train struck him. His view from the platform where he looked north was partially obstructed, but that it was not wholly so is shown by the evidence of witnesses who afterwards made observations from the same point, and under practically the same circumstances, and who testified that about two feet of an ordinary box car could be seen four or five hundred feet north; and the evidence tended to show that a train coming south from that point would come into clearer view as it approached until it reached the cars standing immediately in front of the hide cellar door. The plank crossing of which we have spoken was about one hundred feet north of this cellar door. The record does not show by whom it was placed there, but does show that it was used for trucking and other purposes. Had the deceased gone to that crossing, he would have had no tracks to cross except the center or main one. There were cars standing on the west track north of the crossing, however, and whether the danger of crossing there without looking immediately before stepping upon the track would have been greater or less than where the deceased at-

tempted to cross would depend very much upon his position on the crossing.

Whether, under all of these facts and circumstances, it should be held as a matter of law that the deceased was negligent in not using this crossing, and in not looking and listening when he stepped around the car and before going upon the main track, are questions presented in argument, and the latter one, at least, is very close. As to the former, it is contended that the plank crossing afforded a safe way, and that it was negligence to cross at any other point. This was a question for the jury, however. The crossing was a private one, for which no statutory signals were required and none given. The train passed over it at the same speed that it traveled elsewhere through the alley, and, aside from the fact that the side tracks did not extend over it, it was no more safe than any other point between the buildings; and, as we have said, the implied invitation to cross the tracks applied as strongly to all other points as to this because of the long-continued custom and practice of the employés. Had it been an absolutely safe and convenient way, it might, perhaps, be said as a matter of law that the deceased was negligent in not using it. If the deceased's view from the platform when he looked north had been entirely obstructed, there can be no question as to his duty to again look when he reached a point where he could have seen the track, and under such circumstances the fact that others had safely crossed immediately before him would not, perhaps, excuse his neglect. But here he could have seen moving cars at least 500 feet away. He and Brodigan both looked north, and the latter saw no cars in motion; hence it may be presumed that the deceased saw none. They immediately thereafter started to walk south, and in a few seconds later the other two had crossed the track in safety ahead of the deceased, and without any warning to him that a train was approaching. Had the train been running at the ordinary yard speed instead of at the rate of 18 or 20 miles an hour,

the deceased could have crossed the tracks in perfect safety, and is it not fair to presume that he considered this matter when he started from his point of observation to make the crossing? *Camp v. C. Gt. W. Ry. Co.*, 124 Iowa, 238.

Could different inferences justly be drawn from the acts of the deceased, under all the facts and circumstances proven? If so, it was error to hold as a matter of law that he was negligent. *Selensky v. C. G. W. R. Co.*, 120 Iowa, 113; *Cummings v. C., R. I. & P. Ry. Co.*, 114 Iowa, 86; *Moore v. C., St. P. & K. C. R. Co.*, 102 Iowa, 599; *McLeod v. C. & N. W. Ry. Co.*, 104 Iowa, 141, and cases there cited; *Schulte v. C., M. & St. P. Ry. Co.*, 114 Iowa, 94; *Cleveland, C., C. & I. Ry. Co. v. Harrington*, 131 Ind. Sup., 426 (30 N. E. 37); *Pittsburg, Ft. W. & C. Ry. Co. v. Callaghan*, 157 Ill., 406 (41 N. E. 909); *Grand Trunk R. Co. v. Ives*, 144 U. S. 408 (12 Sup. Ct. 679, 36 L. Ed. 485). While, as we have heretofore said, the case is close, we reach the conclusion that it should have been submitted to the jury, and the judgment is therefore reversed.

STATE OF IOWA V. ELVIN ICENBICE, Appellant.

Rape: CHANGE OF VENUE. The affidavits in support of a resistance to
 1 a motion for a change of venue in a criminal case, on the ground
 of excitement or prejudice in the county, are not required to nega-
 tive any relationship between affiants and the complaining witness.

Same. An application for change of venue is addressed to the dis-
 2 cretion of the trial court, and its order will not be interfered with
 on appeal in the absence of a showing of abuse of such discretion.

Peremptory challenges. Swearing of the jury in a criminal case
 3 before the defendant had exhausted his peremptory challenges, was
 not reversible error, where he made no objection nor excepted
 thereto.

Identity of defendant. In a prosecution for rape, the confessions of
 4 defendant constitute sufficient evidence to take the case to the jury
 on the question of his identity.

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Confessions. Where a confession appears to have been voluntarily
5. made, the burden is on defendant to show such coercion or inducement as to require its exclusion.

Confession: INSTRUCTIONS. Where the commission of rape by some-
6 one was fully shown, the fact that evidence of confessions of defendant was introduced to supply the corroboration required to connect defendant with the crime, did not require an instruction that he could not be convicted on his confession not made in open court.

Venue: INSTRUCTIONS. Where the venue is clearly proven and the
7 necessity of proving the same is stated in an instruction relating to an included offense, the failure to so instruct in connection with the higher offense charged, is not error.

Complaint of prosecutrix. In rape, failure of the prosecutrix to make
8 complaint affects only her credibility, and circumstances of excuse may be shown to negative any inference to be drawn from such failure.

Appeal from Poweshiek District Court.—HON. W. G. CLEMENTS, Judge.

TUESDAY, NOVEMBER 15, 1904.

THE defendant was indicted with others for the crime of rape, and on conviction of assault with intent to commit rape was sentenced to imprisonment in the penitentiary for the term of eight years. From this sentence he appeals.
— *Affirmed.*

W. R. Lewis and *Tom H. Milner*, for appellant.

Chas. W. Mullan, Attorney-General, and *Laurence De Graff*, Assistant Attorney-General, for the State.

McCLAIN, J.—The transaction which the prosecution sought to prove on the separate trial of this defendant under the indictment against him and others is the same as that sought to be proven by the prosecution on the several trials of one Orris Wolf, who has three times appealed to this court from conviction of assault with intent to commit rape under

the same indictment. See *State v. Wolf*, 112 Iowa, 458; 118 Iowa, 564; 100 N. W. 1123.

I. The trial court overruled a motion for change of venue, based on the ground of excitement and prejudice on the part of the people of Poweshiek county, in which the crime was committed, caused by the publication of alleged facts and details of the crime in the newspapers circulated in that county prior to the trial, and also arising from the fact of several trials in the same county of other defendants charged with the same crime. This motion was supported by an affidavit sworn to by twelve citizens of the county, stating their belief that the defendant could not obtain a fair trial because of the excitement and prejudice of the people of the county against him. A resistance to this application was made, supported by an affidavit of twenty-eight citizens of the county stating that to their knowledge there had been no inflammatory articles published in the newspapers of the county regarding the alleged crime, that there was no excitement or prejudice in the county against defendant, and that defendant could obtain a fair and impartial trial in that county. Some comment is made by counsel on the affidavit in resistance on the ground that it does not show that affiants were not related to the prosecutrix, nor that they did not stand in relation to her of guardian or ward, employer or employé, or any other confidential relation; but it is sufficient to say that we find no requirement in the statute that such relations to the prosecutrix be negatived by those signing affidavits supporting the resistance to the application for a change. See Code, section 5346.

The application for a change of venue in a criminal case is addressed to the discretion of the trial judge, and he is required to decide the matter "according to the very right of it." See Code, section 5348. It is conceded

2. SAME.

by appellant that this court will not interfere with the conclusion of the trial court in ruling on the application for change except where there is a clear abuse of ju-

dicial discretion. *State v. McDonough*, 104 Iowa, 6; *State v. Edgerton*, 100 Iowa, 63; *State v. Weems*, 96 Iowa, 427. We see no occasion here for interfering with the action of the trial judge. The newspaper comments complained of are not set out in the application, nor shown by the affidavit in support of it, nor are we justified, on the mere allegation of excitement and prejudice resulting from previous trials involving the same transaction, denied as it is in counter affidavits, to find that the trial court abused its discretion in refusing to grant the change on that ground.

II. It is urged for the appellant that the jury was sworn before defendant had exhausted his peremptory challenges.

3. PEREMPTORY CHALLENGES. The record shows that, after the court had called on the prosecution and the defense alternately to exercise their peremptory challenges, twelve jurors being in the box, in each instance accepted for cause, the prosecution waiving its peremptory challenges, and the defendant, after interposing four peremptory challenges, having waived his two succeeding peremptory challenges, the court, without calling upon either of the parties to exercise another or further peremptory challenge, and the defendant not having waived any more or other of his peremptory challenges than the fifth and sixth, the jury was by the court duly sworn. Defendant at this time did not object to the swearing of the jury, nor ask to interpose any further challenges, and the case before us is thus distinguished from *State v. Hunter*, 118 Iowa, 686, on which counsel for appellant reply; for in that case counsel for defense protested that they had another challenge, and were not through with their challenges. The ruling of the lower court in that case was that the waiver of one challenge constituted a waiver of all other peremptory challenges to the same jurors. This ruling was held erroneous, but there is nothing in the opinion to require a reversal of the case before us, in the absence of any showing that the defendant expressed an intention to exercise further peremptory chal-

lenges, or objected to the swearing of the jury until his peremptory challenges were exhausted. Defendant in this case did not even except to the action of the court in swearing the jury, and in no way did he call the court's attention to the fact that his further right of peremptory challenge was being improperly cut off. Under such circumstances we must hold that no error was committed of which defendant can now complain.

III. It is contended that there was no evidence identifying defendant as the person who had the sexual intercourse with prosecutrix to which she testified. It is true that the prosecutrix as a witness failed to identify him; but his own confession, made to the officer who arrested him in Nebraska and to others after his arrest, constituted sufficient evidence of his identity to go to the jury; and we do not see how the jury could have had any reasonable doubt that he was the very person who committed the wrong upon prosecutrix of which she testified.

4. IDENTITY OF
DEFENDANT.

IV. Complaint is made of the introduction in evidence of the testimony of the deputy sheriff who arrested defendant as to statements made by defendant to him, constituting, in effect, a confession. Where the confession appears to have been free and voluntary, the burden is upon the defendant to show coercion or inducement such as to require its exclusion. *State v. Storms*, 113 Iowa, 385. The fact that the defendant at the time of making the confession was in custody does not tend to indicate that it was involuntary. *State v. Peterson*, 110 Iowa, 647; *State v. Penney*, 113 Iowa, 691.

5. CONFESSIONS.

In this connection we may notice the objection that the court did not instruct the jury to the effect that a defendant cannot be convicted on his own confession, not made in open court, unless accompanied with other proof that the offense was committed. Code, section 5491.

6. CONFESSIONS:
instructions.

No such instruction was asked, and the case did not call for such an instruction. There was ample evidence

that the crime had been committed by some one; and at no stage of the proceedings had it been contended in behalf of the defendant that the prosecution rested on defendant's uncorroborated confession. The fact seems to be that, having proved the commission of the crime charged by the testimony of the prosecutrix, the prosecution introduced proof of the confession for the purpose of supplying the corroboration required in such cases to connect the defendant with the commission of the crime (Code, section 5488), and there is no reasonable question as to its sufficiency for that purpose.

V. It is urged that there is no evidence as to the venue of the crime, and that the court did not, in its instructions, require the jury to find that the crime was committed in Poweshiek county. It is true that in the preliminary instructions regarding the issue nothing seems to have been said as to the necessity of proving the venue; but in three instructions relating to included crimes, one of which was as to the offense of an assault with intent to commit rape, of which defendant was convicted, the jury were charged as to the necessity of finding that the defendant made the assault in that county with the intent to ravish, etc., and defendant could not possibly have been prejudiced by a failure to instruct as to the necessity of proving venue in connection with the charge relating to the higher offense for which he was put on trial. The evidence as to the venue was amply sufficient, and we need not go into its details.

VI. Much stress is laid by counsel on failure of the prosecution to show any complaint by prosecutrix after the commission of the offense. Such failure, however, affects only the credibility of her testimony, and circumstances of excuse may be shown to be considered by the jury as negating any inference to be drawn from the want of complaint. *State v. Peterson*, 110 Iowa, 647; *State v. Snider*, 119 Iowa, 15; *State v. Wolf*, 118 Iowa, 564. The instruction of the court as to the

7. VENUE: instructions.

8. COMPLAINT OF PROSECUTRIX.

weight to be given to the failure of prosecutrix to make complaint as a circumstance affecting her credibility is not complained of, and is not open to objection.

VII. Various objections are urged with reference to the introduction of testimony, but, without discussing them at length, it is sufficient to say that they are without merit. The defendant seems to have had a fair trial, and there is ample evidence to support the verdict.

The judgment of the trial court is therefore *affirmed*.

JENNIE H. WILLIAMS, Plaintiff, v. DES MOINES LOAN AND TRUST Co., Defendant, and

ISAAC RUSHMAN and ISAAC FORSYTHE, ET AL., Appellees,
v. R. W. MARQUIS, Appellant.

Receivers: FINAL REPORT: SETTING ASIDE. A receiver is so largely
1 under the direction and control of the district court that an order
setting aside a final report and discharge will not be disturbed on
appeal, unless there is a clear abuse of discretion.

Motion book: NOTATION OF ORDERS. Where a rule of court requires
2 all orders made while in session to be entered on a calendar or
motion docket, a receiver should note thereon the filing of his
final report, petition for discharge and the order fixing the time
of hearing and manner of service.

Notice of receiver's final report: JURISDICTION. Where a notice of
3 hearing on a receiver's final report is signed by no one and ad-
dressed to no one, and the order fixing the time of hearing of the
report and for service of the notice is not entered of record until
after the service is made, there is an entire lack of notice, and the
court is without jurisdiction to enter an order of discharge based
thereon.

Same. Although notice of a receiver's final report and fixing the time
4 of hearing thereon is not required by statute, yet where it is re-
quired by an order of court, a discharge procured without compli-
ance may be set aside.

Adjudication. The overruling of a motion to set aside an order dis-
5 charging a receiver, because not the proper remedy, is not a bar
to a petition for the same purpose.

Parties: SETTING ASIDE RECEIVER'S REPORT. The court may set aside
6 the final report and discharge of a receiver on the petition of any person interested, without requiring other creditors or the original parties to the litigation to be brought in.

Appeal from Polk District Court.—HON. JAMES A. HOWE,
Judge.

TUESDAY, NOVEMBER 15, 1904.

APPELLANT, Marquis, was appointed receiver of the Des Moines Loan & Trust Company, and in November of the year 1901 filed his final report and was by the court discharged. This was an application to set aside the order of discharge, which was sustained by the trial court, and the receiver, Marquis, appeals.—*Affirmed.*

W. C. Marquis, for appellant.

E. S. Wishard and *J. K. Macomber*, for appellees.

DEEMER, C. J.—The application to set aside the final order of discharge is bottomed upon (1) fraud in obtaining the same; (2) irregularity in procuring it; (3) failure to give notice of the application for the order, or of the filing of the final report; (4) failure to assign the cause for the hearing, and to give notice by publication as required. It is claimed that the receiver failed to account for a large amount of property in his hands. Marquis was appointed in March, 1896. In June of the year 1897 the assets of the Des Moines Loan & Trust Company were ordered sold, and under permission of the court the receiver was allowed to bid upon the property; and, his bid being the highest, it was accepted, and a sale to him was ordered, and approved by the court. The assets were sold by schedule, and it is claimed that certain thereof were not included in the sale to the said receiver. Having made no report, appellees herein, in the year 1901, filed a motion to require the receiver to

file a final report. This motion was sustained, and on October 19, 1901, he filed his final report. November 9, 1901, the court made an order for the hearing of the report, and directed that notice thereof be given by publication. This order was signed by the judge, and it fixed the time for hearing as November 23, 1901, and directed that notice thereof be given in a newspaper by three publications. It was not entered of record, however, until January 10, 1902. A notice directed to no one, and signed by no one, was published in the newspaper, as directed, on the 12th, 13th, and 14th days of November, and proof of publication was filed November 23, 1901. At the time fixed the court proceeded to hear the final report and application for discharge, and, no one appearing to object thereto, the report was approved, and the receiver discharged. Appellees had no actual notice of the filing of the final report and application for discharge, or of the time fixed for the hearing thereon, and were never informed of the order made by the trial court.

A rule of the district court of Polk county requires that all orders made while court is in session be entered upon a calendar or motion docket prepared for the use of the court and bar. It also appears that it was the universal custom in that county to enter upon what is known as the motion calendar all final reports of receivers, all applications for orders and motions for discharge. In the instant case no notation of any kind was made upon the motion book of the filing of the final report and application for discharge or order for the hearing of said report and for publication of notice, or of the affidavit of publication; nor was the order for publication entered upon the court journal until after the receiver had been discharged. Having no notice of these matters, appellees, in January of the year 1902, filed another motion for an order requiring the receiver to report, and were then informed that he had made a final report, and had been discharged. Thereupon, and within five days, appellees filed a motion to set aside the order of discharge, and this was

followed by a petition for the same purpose filed February 21, 1902. After hearing the evidence, the trial court overruled appellees' motion, but sustained their petition, and the order approving the receiver's final report and discharging him was set aside, and appellees were given thirty days within which to file objections to the final report. The appeal is from this order.

The receiver was an officer of court, and largely under its direction and control; and such an order as the one here involved is so largely a matter of discretion that we should not interfere, unless a clear abuse thereof is shown.

1. FINAL REPORT:
setting aside.

The trial court, in making its ruling, announced the practice prevailing in Polk county with reference to noting the filing of motions, orders, etc., upon the motion docket, and we must accept its statements in this regard as a verity. In virtue of this custom the receiver should have noted on the motion docket the filing of his final report and petition for discharge, and the order of the court fixing the time of hearing thereon and directing publication of notice thereof. This was not done.

2. MOTION
BOOK: nota-
tion of orders.

Moreover, the order itself was not entered of record until after the publication was completed, and the published notice was insufficient because not directed to any one or signed by any one. *Steele v. Murry*, 80 Iowa,

2. NOTICE OF RE-
CEIVER'S FINAL
REPORT: jur-
isdiction.

336. The order fixing the time of hearing was not journalized or entered of record until January 10, 1902, more than two months after it was made; and the publication, such as it was, was nearly that length of time before the entry of the order authorizing the same. We have a case, then, not simply of defective notice, but of no notice. Such being the case, the order of final discharge was without jurisdiction, and subject to attack as soon as discovered. That an order is of no validity until entered

of record, see *Callanan v. Votruba*, 104 Iowa, 672; *Winter v. Coulthard*, 94 Iowa, 312.

But it is argued that, as notice of the filing of a final report or of the time fixed for the hearing thereof is not required by statute, all these matters are immaterial. But not

so. Although not required by statute, the
4. SAME. trial court undoubtedly had inherent power to require such notice before discharging its officer; and if it found that a discharge was secured without compliance with its order, it had the undoubted right to set aside an order so obtained.

Some claim is made that an attorney for the appellees was notified of all the proceedings in the case, but this is denied by him, and with the conclusions of the trial court on a conflict of evidence we are not disposed to interfere.

The only matter tried in the district court was whether or not the original order of discharge should be set aside. This was with the consent of the receiver, and to that question we are limited here. But, if it were otherwise, the applicants herein have made such a showing of merit that the trial court was justified in setting aside the original order approving the receiver's final report.

Various technical points are made by appellant, all of which we have examined, but find that none are well taken. It is argued that the petition to set aside the order was filed

too late, but there is manifestly nothing in this
5. ADJUDICATION. contention. Further, it is contended that, as appellees' motion to set aside was overruled, this is an adjudication binding upon appellees, and that they could not thereafter proceed by petition to accomplish the same end. The motion was denied because not the appropriate remedy, and the ruling thereon did not constitute an adjudication or a bar to a proper application by petition. The same remedy was sought in each case, so there was no election of remedies. It was not a motion after a motion, but a petition after a motion, the time for the filing of which had not expired.

Lastly, it is argued that, as the original parties to the suit in which the receiver was appointed and the creditors of the defendant company were not all made parties to the

6. PARTIES: setting aside receiver's report.

petition to set aside, the trial court had no jurisdiction. There is nothing in this point.

Any creditor interested in the loan and trust company had the undoubted right to attack the report of the receiver, was interested in the order of discharge, and might, on his own motion, and without bringing in other creditors or the original parties to the suit, petition the court to set aside its order of discharge. The receiver was not originally an adversary party. He represented each and all of the creditors, was an officer of court, and the court might, on application of any one interested, set aside the final report and order of discharge without requiring any other creditors or the original parties to the litigation to be brought in. In this respect the order attacked differs from an ordinary judgment.

No reason appears for interfering with the discretion of the trial court in setting aside the order for discharge, and it is in all respects *affirmed*.

ELLEN S. KEIM, Appellant, v. CITY OF FORT DODGE.

Sidewalks: EVIDENCE: KNOWLEDGE OF DEFECTIVE WALK. In an action

- 1 for injury at night from an alleged gutter apron, evidence that the apron was the same as those which were and for a long time prior had been in general use in the city, was admissible as bearing upon plaintiff's knowledge of the same, it appearing that she had been a resident of the city for several years and had used the walks as pedestrians usually do.

Evidence: BELIEF THAT WALK WAS SAFE. Where plaintiff contended

- 2 that she did not know of the defect in the walk until after the accident, her belief that she could safely pass over the same was immaterial.

Evidence: ABILITY TO DISCOVER DEFECT IN WALK. Where it appeared

- 3 that the city had undertaken to light its streets, but that no light

was located at the corner where the accident occurred, and the evidence was conflicting as to whether the lights were burning at the time of the injury, it was competent for plaintiff to show that the lamps were burning and did not give sufficient light at the place of accident to disclose the defective character of the walk.

Ordinary care: INSTRUCTIONS. Where the court instructed generally
4 that a pedestrian is required to use ordinary care to avoid an accident, a further instruction that if plaintiff knew of the defect in the walk or if the street was dimly lighted, she was bound to use "a greater degree of care" than if she had no knowledge of the defect or if the street was well lighted, was misleading.

Appeal from Webster District Court.—HON. J. R. WHITAKER, Judge.

WEDNESDAY, NOVEMBER 16, 1904.

SUIT to recover damages for a personal injury caused by a defective sidewalk. Trial to a jury, and a verdict and judgment for the defendant, from which the plaintiff appeals.—*Reversed.*

Healy Bros. & Kelleher, for appellant.

M. J. Mitchell and Wright & Nugent, for appellee.

SHERWIN, J.—This action is based upon the negligent construction of an apron or approach leading across the gutter from the end of the sidewalk to the street crossing proper. The apron was set in from the outer edge of the walk about a foot, and while the plaintiff was passing along the walk, and when she reached the end thereof, she stepped therefrom into the ditch or gutter, and received the injury complained of. This occurred at about 9 o'clock at night. The plaintiff had been living in Ft. Dodge for several years before the accident, and had used its streets and sidewalks as pedestrians usually do. The defendant was permitted to prove, over the objection of the plaintiff, that the apron in question

1. EVIDENCE:
knowledge of
defective
walk.

was similar to those used generally in the city at that time and long prior thereto. This evidence was admissible, not for the purpose of excusing the defendant's negligence, but for the purpose of showing the plaintiff's general knowledge of the aprons in use in the city. If she had actual knowledge of this matter, or if, by a long use of the streets and walks, she should have known thereof, it was a proper subject for the jury to consider in determining whether she was herself exercising ordinary care at the time she was injured. *McKee v. C., R. I. & P. Ry. Co.*, 83 Iowa, 616; *Coates v. B., C. R. & N. Ry. Co.*, 62 Iowa, 486; *Couch v. The Watson Coal Co.*, 46 Iowa, 17.

The appellant offered to prove that she believed that she could safely use the walk in question, but according to her pleading and to her own testimony she did not know of the defective apron until after she was injured, and such being the case, her belief was immaterial. Had she known of the defect, and then chosen that route rather than another known to be safe, the testimony would have been competent under the repeated holdings of this court. *Nichols v. Town of Laurens*, 96 Iowa, 388, and similar cases.

The evidence showed that the city had undertaken to light its streets by the use of arc electric lights; that there were several of such lights at street intersections distant from the place of the accident from three hundred and fifty feet to one thousand and two hundred feet, but that no lamp was located at this particular corner. There was a conflict in the evidence as to whether the surrounding lamps were burning at the time, and the appellant offered testimony tending to show that, when burning, the lamps did not furnish sufficient light at the place of the accident to disclose the defective character of the apron. We think this evidence should have been received. While it is true that the city was not bound to light its streets in the first instance, having undertaken to

2. EVIDENCE:
belief that
walk was
safe.

3. EVIDENCE:
ability to dis-
cover defect
in walk.

do so, it was competent to show the efficiency of the service as bearing upon the question of its negligence and the appellant's contributory negligence. Of course, the precise question for determination was the condition at the time of the accident, but, if the corner was dark when the lights were on, the evidence was clearly competent for the purposes indicated. 2 Dillon's Municipal Corporations (4th Ed.) section 1010; *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407.

On the question of contributory negligence the court instructed generally that the plaintiff was required to use ordinary care in using the walk, but in its twelfth instruction the jury was told that, if the gutter crossing was in the dark, or but dimly lighted, it was the duty of the plaintiff to exercise a greater degree of care than if the same were well lighted. What the court had in mind, and the thought sought to be conveyed, was undoubtedly that greater caution or watchfulness would be necessary to constitute ordinary care under such circumstances, and it is possible that the jury may have so understood the instruction. It was misleading, however; and, while we would not feel inclined to reverse on this ground alone, we cannot approve the language used. *Stier v. City of Oskaloosa*, 41 Iowa, 353; *Hall v. Town of Manson*, 90 Iowa, 588, *Langhammer v. City of Manchester*, 99 Iowa, 295. The same criticism applies also to the statement in the same instruction that, if the plaintiff knew of the existence of the gutter, she was bound to use "greater degree of care to be on the lookout to avoid the same than if she had no knowledge of its existence." *Hamilton v. Des Moines Valley R. R. Co.*, 36 Iowa, 38; *Mathews v. City of Cedar Rapids*, 80 Iowa, 459; *Matthieson v. Burlington, C. R. & N. W. R. R. Co.*, 125 Iowa, 90.

What we have said regarding the latter part of instruction 12 applies as well to a part of instruction 10.

4. ORDINARY
CARE: in-
structions.

Other errors argued are not likely to arise upon a re-trial of the case, and we shall not further notice them.

For the reasons indicated, the judgment is *reversed*.

H. BODDY, Appellant, v. B. F. HENRY, Mrs. B. F. HENRY,
H. CONOVER, L. W. CONOVER, Appellees.

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| 126 | 31 |
| 133 | 341 |

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| 126 | 31 |
| 137 | 541 |
| 137 | 700 |

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| 126 | 31 |
| 143 | 741 |

False representations: QUANTITY OF LAND. In an action for damages

- 1 based on false representations as to the quantity of land conveyed, tax receipts delivered by defendant to plaintiff stating the number of acres, were admissible as tending to show the vendor's knowledge of the amount of land.

Admissibility of evidence. Evidence which is competent for any purpose is admissible, as its application may be limited by appropriate instruction.

Instructions: INTENT TO DECEIVE. In an action for false representa-

- 3 tions, an intent to deceive will be presumed from proof of the falsity of the statements and defendant's knowledge thereof; and repeated instructions placing upon plaintiff the additional burden of showing that the representations were made with intent to deceive, and omitting from the entire charge any statement that fraudulent intent would be inferred from proof of the known falsity of representations, was error.

Special interrogatories. It was error to submit a special interroga-

- 4 tory as to whether defendant guaranteed the quantity of land conveyed, where the real issue was whether defendant had made such representations that plaintiff had the right to rely thereon as a warranty.

False representations: EVIDENCE. In an action for false representa-

- 5 tions as to the quantity of land, the evidence is reviewed and held sufficient to warrant a verdict that the alleged representations were made.

False representations: RELIANCE UPON. A purchaser of land may

- 6 rely upon the vendor's representations as to the quantity, even though he makes a personal inspection, not amounting to an investigation to satisfy himself, from sources independent of the vendor and his agents.

Liability for false representations. A refusal to guarantee the quan-

- 7 tity or quality of property sold, is not inconsistent with a liability for false representations in respect thereto.

Qualified statement as to quantity. Where a vendor represented the tract conveyed to contain "about" 17,000 acres when there was in fact but 15,300, such qualification did not defeat the vendee's right to damages for the false statement.

Transfer of land: FRAUD: DAMAGES. The sale by a corporation of its capital stock, its sole assets consisting of a tract of land, operated as a transfer of the land and entitled the vendee to an action for damages for false representations as to the quantity, the same as though the transfer had been by deed.

Appeal from Franklin District Court.—HON. J. H. RICHARD, Judge.

THURSDAY, NOVEMBER 17, 1904.

THE opinion states the case.—*Reversed.*

F. M. Williams and Albrook & Lundy, for appellant.

E. P. Andrews and W. A. Powell, for appellees.

WEAVER, J.—In the year 1897 the defendants were the owners of substantially all of the capital stock of a corporation known as the Clay County Land & Cattle Company of Texas. They were also the officers and directors of said corporation. Nearly or quite all of the assets of the corporation were represented by a ranch in Clay county, Texas, which it had advertised for sale. At the same time the plaintiff was the owner of a farm of 1,760 acres in Franklin county, Iowa, which he desired to dispose of; and, through efforts of certain real estate brokers, the parties were brought into negotiation for an exchange of lands, which was effected on or about October 26, 1897. There was no conveyance of the Texas land to the plaintiff, but the same end was effected by a transfer of the capital stock of the corporation. On July 28, 1898, this action was begun at law to recover damages on account of alleged false and fraudulent representation by the defendants as to the quantity of land contained in the ranch, and upon trial

there were a verdict and a judgment in plaintiff's favor. On appeal to this court the judgment was reversed, and new trial ordered, on account of certain errors found in the record. *Boddy v. Henry*, 113 Iowa, 462. The petition, which has been amended and substituted since the cause was remanded, is stated in three counts: (1) That, to induce plaintiff to make the exchange, defendants represented to him that the ranch contained 17,334 acres of land, and that, believing and relying on said representations, he made the exchange, but has since discovered and charges the fact to be that the actual quantity of land owned by the corporation did not exceed 15,300 acres. He further alleges that defendants knew at the time that their said representations were untrue, and made the same to deceive and defraud him. (2) That he made said purchase of capital stock on the basis and understanding that the same represented land owned by the corporation to the extent of 17,334 acres, which land was worth from \$6 to \$10 per acre, but was afterward found to measure but 15,300 acres, thus resulting in a partial failure of consideration for said purchase. (3) That in effecting said exchange the defendants represented to plaintiff that the ranch contained 17,334 acres, and that on said basis the value of the capital stock was estimated and fixed by the parties at \$30 per share; that in truth, as was afterward learned, said ranch contained but 15,300 acres, by reason of which fact the value of said capital stock was materially affected and reduced, to the plaintiff's loss.

On these allegations, judgment is demanded against the defendants in the sum of \$27,000. A demurrer by defendants to the second count of this petition, and a motion to strike the same as stating no cause of action, were overruled, and defendants answered, admitting the exchange of property, but denying all other allegations made by the plaintiff. On trial to a jury there was a verdict for the defendants, and from the judgment rendered thereon the

plaintiff appeals. The principal errors assigned and argued will be considered in the following paragraphs.

It should also be stated, by way of preface to the discussion of the errors assigned, that the trial court refused to submit any question to the jury upon the second count of the petition, but submitted the case on the theory that plaintiff's cause of action was upon two counts only — first, fraud and false representations as to the quantity of land; and, second, representations and statements amounting to a warranty of such quantity.

I. The plaintiff introduced evidence tending to show that during the negotiations for the exchange the defendants stated and represented to him that the ranch contained 17,000 or more acres of land. The defendant, L. W. Conover, while insisting that he refused to guaranty the acreage of the land, admits that they told plaintiff there was about 17,000 acres, and says he then believed such to be the fact. There was other evidence tending strongly to show that the ranch, by actual measurement, contained only about 15,300 acres. In view of this testimony, it then became a matter of importance upon the issue of false and fraudulent representations for plaintiff to show, if he could, that defendants knew these representations were untrue. As bearing upon this proposition, the tax receipts for taxes paid upon the ranch property by the corporation under date of December 25, 1895, and January 27, 1897, which receipts, the plaintiff testified, were delivered to him by the defendants, together with certain other papers and documents pertaining to the property after the exchange had been effected, were offered in evidence. These receipts purport to describe the land in a general way, stating the number of acres in the several tracts, the aggregate of which shows a total of something less than 15,000 acres. This evidence was objected to by the defendants as being incompetent, irrelevant, and immaterial; and, the objection being sustained by the court, error is as-

1. FALSE REPRESENTATIONS:
quantity of
land.

signed by the appellant. This ruling is defended by counsel for appellees on the theory that the receipts do not tend to show any notice to the defendants of the quantity of land in the ranch, and that we cannot presume that defendants ever read or knew what the receipts contained. But it must be remembered that notice or knowledge, like other material facts, may ordinarily be established by circumstantial, as well as by direct evidence, and we think the possession and delivery of the receipts by defendants to the plaintiff afford ground from which the jury might infer knowledge on defendants' part of what was shown by those documents.

It is true that the law does not create any hard and fast presumption that defendants had read the receipts, but when it is shown that they had in their own hands papers containing material information concerning valuable property, of which, in their corporate capacity, they were the owners; that they were vitally interested in knowing that the taxes upon all the property were paid; and that they preserved such papers and passed them to the purchaser — it is not an unreasonable inference that they knew what was shown thereby. The evidence offered should have been admitted, and allowed such weight and effect upon this phase of the case as the jury might find it entitled to.

It is further argued with reference to the ruling under consideration that the offer was general, and not confined to the question of the defendants' knowledge, and that, in the absence of such limitation, the jury might have treated the receipts as substantive evidence of the number of acres in the ranch, for which purpose, it is said, they were clearly incompetent. The point cannot be sustained. If testimony is admissible for any purpose, it is not open to the objection of being immaterial or incompetent or irrelevant, and the party offering it is entitled to have it go to the jury. If its application or effect should be limited to some particular proposition or issue, that purpose can readily be accomplished by an appropriate in-

2. ADMISSIBILITY
OF EVIDENCE.

struction. It should be said, also, that the admissibility of the tax receipts as tending to show defendants' knowledge of the size of the ranch does not depend alone upon the inferences to be drawn from their possession. Mr. Butcher, defendants' manager, testifies to a statement made to plaintiff by the defendant Henry that he and his attorney "had gone through the papers" for the purpose of finding out how much land the ranch still contained, and had made it about 17,000 acres; and, at his direction, Butcher made a memorandum of the figures, and gave it to the plaintiff. This statement was, in substance, an assurance that Henry had examined all the papers relating to the land, and had obtained all the information they afforded.

II. The trial court instructed the jury that the first count of the petition stated a claim based on alleged false and fraudulent representations concerning the quantity of land in the ranch, and that, in order to recover

3. INSTRUCTIONS:
intent to de-
ceive.

thereon, plaintiff must establish by a preponderance of the evidence that defendants did make the alleged representations; that the representations were false; that plaintiff believed and relied thereon, to his injury, in entering into the contract; that defendants made the representations knowing them to be false; and also that they made the representations, intending thereby to deceive and mislead the plaintiff. The proposition that plaintiff was required not only to show that the defendants made the alleged false representations with knowledge of their falsity, but also to show that they intended thereby to deceive, was stated once or twice in each of five several paragraphs of the charge. The rule thus repeatedly emphasized to the jury is challenged by the appellant, and we think the objection must be held well founded. It is not correct to say that when the plaintiff in an action of this kind has proved that the alleged false representations were in fact made, and that defendants knew them to be false when made, there still remains upon the plaintiff the burden of proving that

defendants intended thereby to deceive and mislead. The true rule, as we interpret the law, is that when the party charging false and fraudulent representations has shown that the representations were made, and that they were false, and known to be false by the party making them, the intent to deceive is implied or presumed. Speaking on this subject, it has been said: "The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the defendant's knowledge. The scienter as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of the opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff." See, also, *Haven v. Neal*, 43 Minn. 315 (45 N. W. Rep. 612); *Johnson v. Wallower*, 18 Minn. 288 (Gil. 262); *Newlove v. Callaghan*, 86 Mich. 301 (49 N. W. Rep. 214); *Judd v. Weber*, 55 Conn. 267 (11 Atl. Rep. 40); *Flower v. Brumbach*, 131 Ill. 646 (23 N. E. Rep. 335); *Baldwin v. Marsh*, 6 Ind. App. 533 (33 N. E. Rep. 973); *Ley v. Ins. Co.*, 120 Iowa, 211; *Mitchell v. Moore*, 24 Iowa, 394; *Hubbard v. Weare*, 79 Iowa, 688; *Foster v. Charles*, 7 Bing. 105.

In *Case v. Ayers*, 65 Ill. 142, the trial court instructed the jury, substantially as was done in the present case, that to justify a verdict for plaintiff on a charge of false and fraudulent representations, it must be shown that the representations were false to the defendant's knowledge, "and that they were made by the defendant to deceive and defraud the plaintiff." This instruction was held erroneous because "nothing more was required to entitle plaintiff to recover than that defendants should have known the alleged false representations to be untrue." A very similar case is found in *Collins v. Denison*, 12 Metc. (Mass.) 549. There

the trial court instructed the jury that it was not enough to prove that the representations were false when made, "unless the plaintiff further showed that defendant made those representations with intent of thereby inducing the plaintiff to make the trade." Exceptions to this instruction were sustained because therefrom "the jury would naturally understand that some independent and distinct evidence upon that point was required." The language here quoted from the Collins Case pointedly indicates the vice of the instruction we are now considering. In view of the repeated statement by the court in several different paragraphs of the charge that plaintiff must show that the representations were made with intent to deceive, the entire omission from the charge of any instruction that the fraudulent intent could be inferred or implied from the known falsity of the representations could not fail to impress the jury with the thought that proof of the making of false representations with knowledge of their falsity was not enough to establish the intent to deceive, but that such intention must be shown by other independent and distinct evidence. The authorities cited clearly support our conclusion. Indeed, any other rule would render fraud and imposition practically impregnable against judicial proceedings for redress to the injured party.

III. The court, on its own motion, submitted to the jury a single special finding as follows: "Did the defendants, or either of them, guarantee to the plaintiff that there was 17,000 acres of land in the Texas ranch in controversy in this case?" To which interrogatory a negative answer was returned. To the submission of this finding, plaintiff excepted, and we think the exception must be sustained. The plaintiff made no claim in pleading or in evidence that defendants guaranteed the quantity of land, and, so far as the defendants touched that question upon the trial, they testified without dispute, that they expressly refused to give any guaranty. The real issue

4. SPECIAL IN-
TERROGA-
TORIES.

presented upon the last count of the petition was whether the defendants, without having given any express guaranty, had nevertheless made such representations and statements of fact that plaintiff had the right to rely upon them as a warranty or assurance that the area of the ranch was substantially greater than it in fact proved to be. The interrogatory was liable to mislead the jury into the idea that the express refusal of the defendants to guarantee the land was decisive against the plaintiff's right to recover at all: If it be said that the interrogatory can be construed as an inquiry whether any representations or assurances amounting to a warranty were made by the defendants, it is a sufficient answer to say that, if this be true, it but demonstrates that the interrogatory was ambiguous, and being ambiguous, was misleading. Moreover, if the interrogatory is to be given the meaning last suggested, it is open to the objection that it does not call for a finding upon a particular fact, but rather for a conclusion in the nature of a conclusion of law to be derived from several facts, and is objectionable on this account. *Thomas v. Schee*, 80 Iowa, 237; *Home Insurance Co. v. Packet Co.*, 32 Iowa, 246; *O'Leary v. Ins. Co.*, 100 Iowa, 399.

IV. It is urged in argument on the part of appellees that there was no evidence before the jury on which a verdict for plaintiff could have been sustained, and that errors, if any, appearing in the record, are therefore

5. FALSE REPRESENTATIONS:
evidence.

without prejudice, and afford no ground for reversal. With this contention we are unable to agree. That defendants did represent the ranch as containing about 17,000 acres of land, there can be no manner of doubt. The agent who negotiated the exchange, and was a witness for the defendants, says he was present at the first meeting of the parties, and that the "amount of land talked of" was 17,000 acres. The defendant B. F. Henry testifies that he told plaintiff there was about 17,000 acres. The defendant L. W. Conover admits that at his first inter-

view with plaintiff he made to him the same statement. In a letter to the broker, Conover writes, "There are about 17,000 acres." On cross-examination he says, "I made the statement to Mr. Boddy that there was 17,000 acres for the purpose of giving him to understand that there was that many acres in the land." The defendants' first offer to plaintiff was taken down in writing in Henry's presence, and, being read to him, received his assent. This memorandum described the ranch as "their land in Texas, 17,000 acres." The land was so described by them in public advertisements offering it for sale. Conover made a written memorandum for plaintiff of the assets of the corporation, again describing the land as 17,000 acres. It is true that defendants declared they would not guarantee the acreage, and referred him to their agent and manager, Butcher, as one who could tell him all about it. Plaintiff sought Butcher, and as we have already noted, received from him a showing which seemed to indicate that the ranch contained 17,334 acres. Plaintiff swears that on his way home he called on Henry and Conover, and told them the result of his interview with Butcher. In this he is corroborated by Conover. Taking the record as a whole it is entirely clear that a verdict finding the alleged representations were made by the defendants, and that plaintiff entered into the contract believing that he was obtaining stock representing an ownership of substantially 17,000 acres of land, would have abundant support in the testimony.

It is said, however, that, even if this be true, plaintiff cannot recover, because he did not rely upon the representations, but investigated the property for himself, and because

the defendants distinctly refused to make any guaranty as to the number of acres. While the record shows that plaintiff went to look at the land before concluding the exchange, yet it is lacking in testimony that he undertook to investigate or satisfy himself as to the number of acres from any other source than de-

6. FALSE REPRESENTATIONS:
reliance upon.

fendants themselves and their own agent, to whom he was directed by them. The rule of which the appellees here claim the benefit is not so broad as suggested. It is manifestly impracticable for any person, however experienced, to ride over or around a body of twenty-five or more square miles of land, surveyed in irregular tracts, and estimate with any reasonable degree of exactness its number of acres; and it is well settled that the buyer who examines land before purchasing may nevertheless rely upon the representations of the seller as to measurements. *Pringle v. Samuel*, 11 Ky. 43 (13 Am. Dec. 214), is an instructive case upon this point. The owner of a small farm contracted to convey it for the gross sum of \$1,000. In a subsequent litigation between the parties the purchaser set up a claim that the seller had falsely represented the farm to contain fifty acres, when in fact it proved to contain a materially smaller quantity. It was shown that the purchaser saw the land before buying, and expressed a doubt as to the number of acres, but accepted the seller's word, and made the purchase. The seller contended, as is done here, that the purchaser, having looked at the land, was bound to protect himself, and could not be heard to say that he relied upon the representations made to him.

The opinion proceeds:

It is also contended that the maxim *caveat emptor* applies, and bars relief, and that the plaintiff was as much bound to ascertain the true quantity as the defendant, and that by admeasurement he could have discovered the truth of the fact, and for that reason he is not entitled to sustain his bill. We do not remember any case in which the maxim quoted has been used by the chancellor in such manner as to **compel him** to shut his ears against false representations, or to give latitude to the vendor of real estate to state facts untruly without any responsibility. The maxim will and ought to have more influence in the sale of real estate than that of a chattel. The former, from its nature, is open to a less precarious inspection as to quality, and, from its perma-

ment character, cannot hide many defects which may be concealed in a chattel. For instance, misrepresentations of its fertility and productions, or even the validity of its title, may be more easily detected; but the quantity requires greater skill and a larger proportion of science than even in this age is acquired by a majority of men. Almost every man may be capable of deciding on the quality of land, while but few can ascertain its quantity with accuracy. This is ascertained by a surveyor and a mathematical instrument, and his decision determines the quantity expressed in most of our title papers. In this matter, therefore, especially when the title papers, as in this case, are silent, each vendor ought to be bound to speak truly:

See, also, 2 Mechem, Sales, section 938; 2 Warvelle, Vendors, section 952; *McGibbons v. Wilder*, 78 Iowa, 531. Nor is this rule peculiar to suits in equity. In *Starkweather v. Benjamin*, 32 Mich. 305, the plaintiff brought an action at law to recover damages for false representations made by defendant as to the number of acres in a tract of land conveyed by the latter to the former. We quote from the opinion written by Campbell, J., as follows:

The defense rested mainly on the ground that the purchaser saw the land and was as able to judge of its size as Starkweather. We do not think the doctrine that, where both parties have equal means of judging, there is no fraud, applies to such a case. The maxim is equally valid that one who dissuades another from inquiry, and deceives him to his prejudice, is responsible. It cannot be generally true that persons can judge of the contents of a parcel of land by the eye. When an approach to accuracy is needed, there must be measurement. When a positive assurance of the area of a parcel of land is made by the vendor to the vendee, with the design of making the vendee believe it, that assurance is very material, and equivalent to an assurance of measurement.

The rule of the case here cited is especially applicable to facts like those at bar, where the buyer is referred for information to the seller's own agent, who answers the in-

quiry in a manner to confirm and strengthen the buyer's confidence in the truth of the representations made by the principal. Plaintiff could not have measured and ascertained the quantity of these lands with any degree of certainty without much time and expense, and we think there is no principle of law or equity which required him to rely upon the defendants' representations at his peril.

Whether the representations were false and fraudulently made, and whether plaintiff believed and relied upon said representations, were questions for the jury, and a misdirection by the trial court in respect thereto

7. LIABILITY FOR
FALSE REPRESENTATIONS.

was necessarily prejudicial. This result is in no manner obviated by the fact that defendants refused to give any express guarantee as to quantity of land. A refusal to warrant or guarantee the quantity or quality of property sold is not inconsistent with liability for false representations. *Haight v. Hayt*, 19 N. Y. 464. In the cited case the plaintiff purchased land at an assignee's sale. At the time and place of sale a third party was present and claimed to have a mortgage lien upon the property. The assignee expressly refused to warrant or guarantee the title against the claim thus made, but falsely stated to the bidders that the claim was worthless and that no such mortgage existed. Relying on this assurance, the plaintiff purchased the land, and the mortgage was afterward established against it. Action was thereupon brought to recover damages. On trial the court refused an instruction asked by the defendants to the effect that, if the assignee refused to warrant the title against the mortgage, the plaintiff must be held to have purchased at his own risk. On appeal this ruling was affirmed. The court, by Grover, J., says:

Upon what principle the refusal of Hayt to warrant against the claim of Delevan, the existence of which he denied, is to protect him, if the denial was made with a design to deceive and defraud the purchasers, is not perceived. * * * The refusal of Hayt to warrant against the claim did not prove that plaintiffs knew of, or believed

that it existed. The question was whether they were deceived by Hayt's representation. If they believed that Delevan's claim was valid, they were not deceived, and could not recover. The refusal of Hayt to warrant was proper evidence for the consideration of the jury upon this point, but did not constitute a legal bar to the action.

A refusal to warrant, or a request that the buyer go and examine the property for himself, may sometimes serve to increase the misleading effect of a false representation. *Webster v. Bailey*, 31 Mich. 36; *Rood v. Chapin*, Walker's Ch. (Mich.) 79.

It is true that defendants, in stating the quantity of land, are shown in most instances to have qualified the figures given by them by the word "about"; the expression commonly used being, "About 17,000 acres."

8. QUALIFIED
STATEMENT AS
TO QUANTITY.

We think this qualification cannot have the effect to defeat plaintiff's right of recovery, if in fact the ranch contained materially less than 17,000 acres, and defendants, with knowledge of the shortage, made these statements to the plaintiff to induce him to believe that there were substantially 17,000 acres, and plaintiff, relying upon such representations, entered into the contract. It is something like the question which has frequently arisen upon the meaning and effect of the words "more or less," which are very commonly appended to the expressed or nominal area of lands stated in deeds of conveyance. Such expressions constitute a recognition of the fact that measurements of land, even by skilled persons, are apt to differ, and that men of intelligence and experience, who are familiar with the premises, may not agree in their estimates; and parties who purchase land in bulk, or as containing an estimated number of acres, can ordinarily obtain no relief on account of any shortage which subsequent accurate measurement may disclose. But the introduction of the words "more or less" or "about" or "estimated," in a conveyance or contract for conveyance, does not afford a shield against

liability for false representations, and the mere fact that a deficiency is very large in proportion to the supposed quantity is often treated as in itself evidence of fraud or of mutual mistake. In such case the purchaser may obtain relief in equity by rescission, or by abatement from the purchase price, or, if the purchase price has been paid, and especially if, by reason of any act on part of the grantor, rescission has been made impracticable, he may have his action at law for damages. *Paine v. Upton*, 87 N. Y. 327 (41 Am. Rep. 371); *Lewis v. Hoeldtke* (Tex. Civ. App.), 76 S. W. Rep. 309; *Couse v. Boyles*, 4 N. J. Eq. 212 (38 Am. Dec. 514); *Harrell v. Hill*, 19 Ark. 102 (68 Am. Dec. 202); *Triplett v. Alden*, 26 Grat. 721 (21 Am. Rep. 320); *Hoback v. Kilgores*, 26 Grat. 442 (21 Am. Rep. 317); *Camp v. Norfleet's Adm'r*, 83 Va. 380 (5 S. E. Rep. 374) *Fiske v. Fleming's Syndic*, 15 La. 202; *Estes v. Odom*, 91 Ga. 600 (18 S. E. Rep. 355); *Anthony v. Oldacre*, (Va.) 4 Call, 489; *Cravens v. Kiser*, 4 Ind. 512; *Blessing's Case*, (Va.) 1 Rob. 287; *Crislip v. Cain*, 19 W. Va. 438; *Wilson v. Randall*, 67 N. Y. 338; *McCandless v. Young*, 96 Pa. 289; *Baltimore v. Smith*, 54 Md. 187 (39 Am. Rep. 374); *Hosleton v. Dickinson*, 51 Iowa, 244. *Anthony v. Oldacre*, *supra*, affords an early example in this country of the application of the principle stated. Anthony sold the land as "supposed to contain 300 acres more or less as he bought it," but refused to guarantee the quantity; declaring that, as he bought it without measurement, he would sell it in the same way. It was proven that after making his purchase, and before the sale by him, he had discovered the tract contained much less than 300 acres, which fact he did not disclose to his vendee. This was held to be such fraud as would entitle the vendee to compensation. In *Baltimore, etc., v. Smith*, *supra*, the contract called for a sale of a tract containing "about 65 acres," but it was found to contain less than 40 acres. The court says: "But what is the force and effect of the qualifying words.

Does it import that quantity was not a material part of the contract? And can the court so declare as a conclusion of law? We think not. The force of the qualifying word, we think, is simply that, while the parties do not bind themselves to the precise quantity of 65 acres, it imports that the actual quantity is a near approximation to that mentioned."

It follows from these considerations, as we have already suggested, that the record before us makes no such clear and undisputed case for the defense that this court can say, as a matter of law, that the errors complained of were without prejudice.

V. Complaint is also made of the instructions as a whole, and of rulings which we do not here specifically recite upon the admission of evidence, but we shall not discuss them. In many instances the exceptions are not well taken, while others involve questions not likely to arise upon a retrial. It is to be said of the instructions as a whole that the trial court, in its commendable anxiety to avoid error in omitting any element needed for a proper explanation of the rules to be observed by the jury, went perhaps to the other extreme, and involved the issue in some obscurity by an unnecessary fullness and repetition of statement, but we think there was no error in this respect which would call for a reversal.

The fact that the Texas land was held by a corporation, and that the exchange with plaintiff was affected by a transfer to him of the capital stock of the corporation, instead of by a conveyance of the land itself, has been the

9. TRANSFER OF
LAND: fraud;
damages.

occasion of considerable confusion in the statements and arguments of counsel on both sides; but the difficulty thus arising pertains to the terms employed, rather than to the essence of the discussion. Speaking generally, the defendants were the corporation, the ranch was its sole asset, a transfer of the capital stock was in fact a transfer of the ranch, and whatever served to increase or decrease the value of the land increased or decreased the value of the stock in precisely the

same ratio. True, the title has remained in the Clay County Land & Cattle Company at all times, but in the form of its representative—the capital stock—the ownership has passed from the defendants to plaintiff. Hence it is that representations as to the extent or quantity of the land have the same materiality which they would possess had they been made pending a transfer of the title by ordinary deed.

For the reasons stated, a new trial must be ordered, and the judgment appealed from is *reversed*.

ADDIE ACHEY, Appellee, v. CITY OF MARION, Appellant.

Sidewalks: EVIDENCE: CHANGE OF WALK. In an action for injury

- 1 from an improperly constructed sidewalk, negligence on the part of a city cannot be proven by showing a change in the walk subsequent to the injury, yet if such evidence is competent for other purposes, it will not be discredited because incidentally disclosing such change.

| | |
|-----|-----|
| 126 | 47 |
| 129 | 380 |
| 126 | 47 |
| 133 | 653 |

Same. Where the defendant in an action for a sidewalk injury intro-

- 2 duced photographs of the place of accident, it was competent for plaintiff on rebuttal to show changes in the walk between the time of the accident and the taking of the photographs.

Instructions: FUTURE PAIN AND SUFFERING. Where there was evi-

- 3 dence that at the time of the trial plaintiff was suffering pain from the injury, an instruction that the jury should allow such damages on account of the future pain and anguish as the evidence warranted, was correct, although the injury was not shown to be permanent.

Refusal of instruction. Where the negligence charged was the im-

- 4 proper construction of a sidewalk and the evidence tended to support the allegation, it was not error to refuse an instruction relating to negligence in failing to repair.

Negligence: EVIDENCE. In an action for injuries from an abrupt ap-

- 5 proach from a street crossing to the sidewalk, the evidence of the city's negligence is reviewed and held sufficient to take the case to the jury.

Appeal from Linn District Court.—HON. J. H. PRESTON,
Judge.

FRIDAY, NOVEMBER 18, 1904.

ACTION to recover damages for a personal injury. Plaintiff alleges that Thirteenth street is one of the public thoroughfares of the defendant city, and is paved with asphalt. She claims that about July 1, 1902, the defendant carelessly and negligently erected, and thereafter, and down to the time of her alleged accident and injury, maintained, a wooden approach from the street paving on said street to the west curb thereof; that said approach was about five feet in length, the west end resting upon the curbstone, and the east end resting upon a piece of timber four inches square, which, in turn, rested upon the top of the street paving. She further says that on the night of July 30, 1902, while she was walking across Thirteenth street from the east toward said approach, she struck her foot against the street end thereof, causing her to fall violently upon the platform of said approach; that no light had been provided at the crossing of said street, and that she did not see said approach, or know of its existence; that her fall was without negligence on her own part. She then alleges bodily injuries, pain, and mental anguish as a result of such fall. The defendant denied generally. From a verdict and judgment in favor of plaintiff, the defendant appeals.— *Affirmed*.

Voris & Haas, for appellant.

F. L. Anderson and Smith & Smith, for appellee.

BISHOP, J.— I. Appellant complains of errors alleged to have been committed in connection with the introduction of the evidence, and we notice such thereof as are presented in argument. Mrs. Jack, a witness for plaintiff, having testified that she lived on the corner of Thirteenth and the intersecting street, said that the approach in question was put in some

1. EVIDENCE:
change in
walk.

time in July, and that it remained there two or three weeks. She then said that the husband of plaintiff called upon her, and told her of the injury to his wife; that at the time of such call the approach had been taken down. She was then interrogated as to the time it was taken down with reference to the time plaintiff was said to have been injured, and she was allowed to answer over the objection of defendant. We think that in this there was no error. Evidently plaintiff was seeking to prove by the witness that she was familiar with the original construction of the approach, that it was dangerous, and that the danger continued down to and after the accident complained of. That such was proper there can be no doubt. While it is not competent to prove negligence on the part of a city by showing changes or repairs in a sidewalk made subsequent to an alleged accident, yet it does not follow that evidence otherwise competent must be rejected because incidentally it may be made to appear that a change had subsequently taken place. In this case the prejudice, if any there was, could have been corrected by an instruction; but none was asked on the subject. What has just been said has equal application to the evidence of J. F. Jack and George Bowman, objected to for a like reason.

Plaintiff, in rebuttal, also introduced several witnesses to testify as to changes in the approach made after the alleged accident, and they were allowed to testify over the objections of defendant. As defendant, in making out its case, had introduced in evidence photographs of the street showing the approach, it was competent for plaintiff to show in rebuttal what, if any, changes had taken place or had been made between the time of the accident and the time of taking the photographs. We understand this was the purpose of the evidence objected to, and we think it was proper.

II. In the eighth instruction the court told the jury that, if plaintiff was found entitled to recover, "you will allow her * * * for all such pain and anguish you find

from the evidence it is reasonably certain she will suffer in the future.” Of this instruction appellant complains, and for the reason that there was no evidence making it reasonably certain that the plaintiff’s injuries were permanent. Evidently counsel for appellant have misconceived the purpose and scope of the instruction. As we read it, it assumes that there may be a finding that pain and suffering on the part of plaintiff will continue for some time into the future. It does not submit the question of permanency of injury, nor was such question otherwise submitted. In her petition the plaintiff alleges not only past and present pain and suffering, but that such will continue in the future, and there was evidence tending to prove that at the time of the trial plaintiff still suffered from her injuries, and that she would continue to so suffer for some time in the future — whether permanently or not, the physicians who testified could not answer. Such evidence, in view of the issues, warranted the instruction as given. *Bailey v. Centerville*, 108 Iowa, 28; *Jordan v. Railroad*, 124 Iowa, 177; *Railroad v. Jones*, 49 Fed. Rep. 343 (1 C. C. A. 282). The cases of *Shultz v. Griffith*, 103 Iowa, 150; and *Van Bergen v. Eulberg*, 111 Iowa, 139, are not in point. In neither of those cases did the damages claimed have any reference to the future.

III. The defendant requested that the jury be instructed that the plaintiff could not recover “unless you find from a preponderance of the evidence that the said street had been unsafe for such a length of time prior to the date of the injury that the officers of the city, in the exercise of reasonable diligence, should have known thereof.” The request was refused, and in the fifth instruction the jury was told, in substance, that it was the duty of the city to construct and maintain the approach in a reasonably safe condition, etc., and that, if it had not done so, it might be held liable. In this there was no error. The negligence charged was improper construction and maintenance.

2. INSTRUCTIONS:
future pain
and suffering.

4. REFUSAL OF
INSTRUCTIONS.

nance, not a want of repair. The evidence tended to support the allegation, and the court rightfully submitted the case as made. *Weber v. Creston*, 75 Iowa, 16; *Ford v. Des Moines*, 106 Iowa, 94.

IV. Appellant insists that a case of actionable negligence was not made out. That the approach was built by the city appears without conflict. The evidence tends to show that such approach was about five feet in width, and extended out into the street on the line of a regular crossing thereof; that the street end of the same presented an abrupt elevation of five or six inches above the surface of the pavement; that no light was maintained at the crossing, and that in the darkness the existence of the approach was not discernible. Surely, this was sufficient to entitle plaintiff to have the question of negligence submitted to the jury. It may be true, as shown by defendant, that it was an easy step from the pavement up on the approach, but this presupposes knowledge of the existing conditions. The jury undoubtedly believed that in the case of a traveler crossing the street in the dark, and ignorant of the condition of the approach, it might be expected that an accident would happen in that his foot would be likely to come in contact with the end of the approach. The question whether plaintiff was exercising proper care at the time was also one for the jury, and was submitted under proper instructions.

V. It is said that the verdict was excessive in amount. This point was urged in a motion for new trial made to the court below, and which was overruled. We cannot say that there was an abuse of discretion. At the time of her injury plaintiff was pregnant, and it was necessary for her to remain in bed until the birth of her child, some two months later, and for a considerable period of time thereafter. The character and extent of her injuries, and the pain and suffering endured by her, and the consequences reasonably to be ap-

prehended in the future, are all such as that the action of the trial court may very well have found justification.

As one of the grounds of damage, however, plaintiff claimed for expenses paid out for medical attendance and treatment in the sum of \$75, and such element of damage was submitted to the jury. It is now conceded by counsel for plaintiff that she was not entitled to recover on such ground, and the offer is made to remit from the judgment as rendered the said sum of \$75. Accordingly, the judgment should be reduced by that sum, and, upon the cause being remanded, the judgment entry will be so modified. In all other respects the judgment is right, and it is *affirmed*.

ANNA FITZGIBBONS, Appellee, v. MERCHANTS AND BANKERS
MUTUAL FIRE INSURANCE COMPANY, Appellant.

Fire insurance: INCUMBRANCE OF PROPERTY: FORFEITURE. The mere
1 accumulation of interest upon a mortgage of which an insurance
company was advised at the time it accepted the risk, will not work
a forfeiture of a policy under a clause warranting against incum-
brances.

Forfeiture of policy. A judgment of foreclosure of a mortgage cover-
2 ing a part only of insured property to which the company consented,
will not work a forfeiture of the policy under a provision therein
that the company should not be liable if suit for foreclosure be
instituted or one in which the title, ownership, or possession "of
the property" insured is involved or called in question.

False representations. The defense of fraud in a suit on an insurance
3 policy cannot be predicated on a representation in the proofs of
loss that there was no suit pending or foreclosure affecting the
title, although a mortgage to which the company assented had in
fact gone to judgment of foreclosure prior to the loss.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

SATURDAY, NOVEMBER 19, 1904.

ACTION on a policy of insurance against loss by fire. From a judgment for the plaintiff upon a directed verdict, the defendant appeals.— *Affirmed*.

C. E. Campbell, for appellant.

Carr, Hewitt, Parker & Wright, for appellee.

WEAVER, J.— Under date of August 9, 1897, the defendant insurance company issued to the plaintiff a policy indemnifying her against loss or damage by fire on her frame dwelling house in the sum of \$850, and on household furniture in the sum of \$500. The principal office of the defendant has at all times been in the city of Des Moines, Iowa, and the insured property was located in the adjacent town of Valley Junction. The policy was issued for a term of six years, and the premium thereon was made payable in yearly installments or assessments. On May 12, 1902, the insured property was destroyed by fire. All the matured assessments or installments of the premium had been duly paid, and it is conceded that plaintiff has furnished to the defendant due proofs of her loss, and that such loss upon the building amounts to \$700, and upon the personal property to \$500. The defendant is therefore admittedly liable to the plaintiff upon the policy in suit in the sum of \$1,200, unless it is relieved from such obligation by reason of matters pleaded in its answer. These defenses will be severally noticed in the further progress of this opinion.

I. It is alleged that at the time the policy was issued there was a mortgage to the amount of \$400 outstanding upon the real estate of which the house formed a part, and, while it is admitted that the company was fully advised of that fact when it issued the policy, it is said that plaintiff allowed the debt to be materially increased by interest accrued and penalties, and thereby worked a forfeiture of the policy. The clause

1. FIRE INSUR-
ANCE: incum-
brance of
property; for-
feiture.

of the policy on which this defense is based is in words as follows:

It is hereby agreed and is by the assured expressly warranted that the insured is the sole and unconditional owner of the property described in this policy; that there is no lien or incumbrance upon said property; * * * that no change or alteration shall be made in the title, interest of the assured * * * either by sale, agreement to sell or contract of sale, legal process or otherwise, * * * and that any breach or failure of any of these warranties, or any violation of any of the terms or conditions of this policy, or failure to comply with the requirements hereof, shall render this policy void, provided that if it be otherwise stated in writing in the application, or if written notice of any facts inconsistent with these warranties, or any of them be given to the Secretary at the Company's office in Des Moines, Iowa, and endorsed upon this policy in writing, and such warranty or warranties be thus expressly modified, then the assured shall be bound by these warranties, only as thus modified.

This defense is not specially urged in argument, and is evidently without merit. The mere accumulation of interest upon a mortgage, of which the company was advised when it entered into the contract, will not work a forfeiture. To hold otherwise is to say that an insurance company may insure mortgaged property, collect the premium, and at the end of twenty-four hours repudiate its contract because the lien has been increased by another day's interest. The language of the policy is not fairly capable of the interpretation which the answer seeks to place upon it.

II. The policy also provided that the company shall not be liable thereon "if suit for foreclosure or in which the title, ownership or possession of the property insured is involved or called in question, be instituted."

**2. FORFEITURE
OF POLICY.**

It also provides that the assured warrants and agrees that "no lien or incumbrance shall fall or be placed" on the property. The defendant alleges that in February, prior to the fire, a suit was instituted for the foreclosure of

the mortgage existing upon the real estate, and that said suit was prosecuted to judgment on or about March 15, 1902. It is also further alleged that plaintiff permitted a judgment to be entered against her prior to the fire, to the amount of over \$700, which judgment became a lien on the real estate, and that by reason of said foreclosure suit and said judgment lien the policy was forfeited. The judgment to which reference is here made is evidently the judgment obtained in the foreclosure proceedings. Forfeiture clauses are not favored by the courts, and will be strictly construed. Now, the condition of forfeiture which this policy provides is the institution of foreclosure proceedings against the "property insured." The "property insured" consists in part of the dwelling house covered by the mortgage, and in part of personal property to which no mortgage or other lien has ever attached; and the foreclosure proceeding did not, therefore, involve the property insured, and no forfeiture resulted. This principle was announced and approved by us in *Börn v. Ins. Co.*, 110 Iowa, 379. In that case, as in this, the insured property consisted both of real and personal property, and contained a clause reciting that, "if the property shall hereafter become mortgaged or encumbered or upon the commencement of foreclosure proceedings," then the "policy shall be null and void." An action having been brought to recover for a loss by fire, the company proved that, after taking out the insurance, plaintiff had placed several mortgages upon the insured personal property; and it was claimed that this fact worked a forfeiture of the indemnity, and no recovery could be had upon the policy. To this contention we said: "It is a familiar rule that forfeitures are not favored, that contracts will be strictly construed to avoid forfeitures, and that the burden is upon him who claims a forfeiture to clearly show that he is entitled to it. The language of the policy is, 'or if the property shall hereafter become mortgaged or encumbered, the policy shall become null and void.' It is the property, not a part of it, not the

real nor the personal, but the whole property, the mortgaging of which renders the policy void. * * * The property is without qualification, and we think it must be held to refer to all the property insured, and therefore mortgaging or incumbering a part of it did not work a forfeiture of the entire policy." Applying the rule thus approved to the case before us, the foreclosure proceedings, being directed against a part only of the property insured, did not have the effect to avoid the contract. It may be said, also, as to the decree entered in said proceedings, that it did not have the effect to create any new lien upon the property insured. Its effect was simply to confirm and establish the lien of the mortgage to which the company had already assented. The plea of forfeiture on the grounds stated is unavailing. *Greenlee v. Ins. Co.*, 102 Iowa, 429.

III. It is next alleged that plaintiff was guilty of fraud and false swearing in making up her proofs of loss. It appears that the blank proofs furnished by the company for the use of plaintiff contained a question 2. FALSE REPRESENTATION. as follows: "Is there suit involving the title of the property or foreclosure now pending?" to which she answered, "I believe not." This response affords no foundation for the alleged defense. There was no foreclosure suit pending. The suit which had before been instituted had been prosecuted to a final decree, and the foreclosure had become an accomplished fact, nearly two months before the fire occurred, and the answer of the plaintiff to the question asked was literally true, all of which it is evident the defendant well knew.

IV. The plaintiff, in reply, pleaded a waiver of the alleged forfeiture, and an election by the company to continue the contract in force. Upon the rulings of the trial court in admitting and refusing testimony in reference to the issue thus tendered, errors are assigned, and to these alleged errors arguments of counsel are principally directed. Having found that none of the several defenses set up by

the defendant have support in the record, it is unnecessary for us to decide whether the matters stated in the reply would have amounted to a waiver.

The judgment of the district court was right, and it is *affirmed*.

MARY M. MURPHY, Adm'x, etc., Appellant, v. W. T. MURPHY & Co., H. A. DUER, ET AL., Appellees, and

MARY M. MURPHY, ADM'X, ETC., Appellant, v. W. T. MURPHY & Co., A. L. RISELY, ET AL., Appellees.

Bankruptcy: PREFERENCE: LIMITATIONS. Under the bankruptcy law 1 of 1898, it is the transfer of the property which is made an act of bankruptcy and not the recording of the instrument; and the four months within which a preference may be avoided by the trustee commences to run at the time the transfer was made.

Same. The amendment of 1903, by which the four months' clause of 2 the bankruptcy act is made to count from the date of the recording of the instrument rather than its execution and delivery, is not retroactive, nor does it affect previous constructions of the statute, but limits the time within which proceedings may be instituted.

Mortgages: AVOIDANCE: RIGHTS OF CREDITORS. The provision of the 3 bankruptcy act that "claims, which for want of record or other reasons would not have been valid liens against creditors of the bankrupt, shall not be liens against his estate," refers to the validity of liens under the State law; and a creditor existing when a mortgage is executed must have acquired a lien on the mortgaged property, by attachment or otherwise, prior to notice of the mortgage to entitle him to question its validity; but a subsequent creditor may attack it on the ground that he was fraudulently induced to extend credit.

Same. Conveyances by a bankrupt can be avoided on the ground 4 that they were given to hinder and delay creditors, only when made within four months prior to the filing of the petition in bankruptcy.

Appeal from Wright District Court.—HON. J. H. RICHARD,
Judge.

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TUESDAY, NOVEMBER 22, 1904.

ACTIONS in equity to foreclose chattel mortgages. The cases were tried together in the court below, and have been submitted together in this court. They may be disposed of in one opinion. In the action first entitled it was alleged that on October 23, 1901, the defendants Murphy executed and delivered to Hanorah Murphy, then living, their promissory note for the sum of \$1,510, due in one year, and a chattel mortgage to secure the same, such mortgage covering the entire stock of goods then owned by them, and situate in Woolstock, Wright County; that said mortgage was filed for record February 22, 1902. H. A. Duer, sheriff, and the La Porte Woolen Mills, were made parties defendant, it being alleged as to them that the former, under an execution issued out of the district court upon a judgment in favor of the latter and against Murphy & Co., had levied upon and taken into possession said stock of goods, and refused to surrender the same to plaintiff. A receiver was prayed for, and the defendants Murphy appeared and consented to the appointment of such receiver. The defendants Duer and La Porte Woolen Mills appeared and answered, setting up the judgment against defendants Murphy, the execution in the hands of the former, and the levy thereof on the stock of goods as of date February 25, 1902. It was then alleged that the mortgage to plaintiff, if any such in fact existed, was made to hinder and delay creditors, was without consideration, fraudulent and void. A receiver was appointed, who subsequently made sale of the stock of goods under order of court, realizing therefrom the sum of \$1,775.38; the receiver's compensation and that of his attorneys to be deducted therefrom. Thereafter L. J. Clark, trustee in bankruptcy, intervened, alleging that on April 18, 1902, the defendants Murphy were adjudged bankrupts in the District Court of the United States; alleging his appointment as

trustee, and that the mercantile indebtedness of said defendants amounted to more than \$4,000, and that said defendants were and are insolvent. The giving and recording of said mortgage was alleged to have been an act of bankruptcy, and judgment was demanded as against all parties for the fund in the hands of the receiver. The further averments of facts in the petition of intervention, as far as material, will be noted in the opinion.

In the action last above entitled it was alleged by plaintiff that on October 23, 1901, the defendants Murphy executed and delivered to Hanorah Murphy their other promissory note for the sum of \$1,500, due in one year, and a chattel mortgage to secure the same, such mortgage covering the entire stock of goods owned by them and situate in the town of Knierim, Calhoun County; that said mortgage was filed for record February 22, 1902. A. L. Risely, sheriff, and Henderson & Guinter were made defendants, the allegations as to them being substantially those made against defendants Duer *et al.* in the case first referred to. In this action a receiver was also prayed for and appointed, and he subsequently made sale of the stock, realizing therefrom the sum of \$1,238.06; the receiver's compensation and that of his attorneys to be deducted therefrom. The defendants Henderson & Guinter also made answer substantially as did the defendants Duer *et al.* in the case first referred to. Other creditors also intervened, alleging demands against the defendants Murphy, charging fraud, etc., and demanding equitable relief. L. J. Clark, trustee in bankruptcy, also intervened in this case, making allegations as in the other case. The cases having been tried, the court ordered judgment in each case in favor of plaintiff as against defendants Murphy for the amount of the notes sued upon respectively. It was then determined and decreed, in effect, that the several mortgages given by defendants Murphy to plaintiff's intestate were violative of the national bankrupt act, and the same were set aside in favor of the trustee in bankruptcy. The execu-

tion levies were also set aside, and the several amounts in the hands of the receiver, after payment of costs and expenses, to be adjusted and taxed, were ordered paid over to said trustee in bankruptcy. The plaintiff alone appeals in each case.— *Reversed.*

Birdsall & Birdsall and *C. M. Nagle*, for appellant.

Wesley Martin, *J. W. McGrath*, and *Eugene Schaffter*, for appellees.

BISHOP, J.— As the execution and intervening creditors have not appealed, it is clear that they are bound by the decrees as entered, and we shall have no occasion to take note of that portion of the record devoted to the several contentions made by them. The complaint of appellant in this court obviously has relation to that portion of the decree denying to her foreclosure and the application of the fund in court to the payment of the judgments in her favor. The contentions of the intervener, trustee, etc., are that at the time of the giving and the recording of the mortgages the defendants Murphy were insolvent in fact; that the property covered by said mortgages was all the property owned by said defendants; that by the filing of said mortgages for record on February 22, 1902, the defendants Murphy committed an act of bankruptcy, the same occurring within four months prior to the filing of the petition in involuntary bankruptcy, which occurred on March 18, 1902; that the giving and recording said mortgages were preferential transfers, and so intended, and were given for the express purpose of enabling the mortgagee to secure a greater percentage of her debt than other creditors of the same class; that said mortgages were and are fraudulent and void for that the same were given by insolvent debtors to secure pre-existing indebtedness, and to hinder, delay, and defraud other creditors, and all with the knowledge and acquiescence of the mortgagee, and said mortgages were purposely withheld from record to con-

ceal the fact of the existence thereof, and to enable the mortgagors to obtain credit, and with the secret understanding that the mortgagors might sell the property for their own use and benefit, and without accounting for the proceeds thereof. To these several contentions we may now give consideration.

I. That the property covered by the mortgages in question was substantially all the property owned by the defendants Murphy is established by the record. So, too, it is clear that said defendants were indebted at the time in an amount in the aggregate considerably in excess of the value of such property. The charge of insolvency, therefore, has been made out.

II. The intervener does not question the execution or the delivery of the mortgages. It will be observed that the instruments were not filed for record until nearly four months

1. **PREFERENCES:**
 limitations. after the date of their execution. It appears that in the meantime the death of Hanorah Murphy had occurred, and the actual filing for record was by this plaintiff. It will be further observed that it is the filing of the mortgages for record that is charged as the act of bankruptcy. The federal statutes in force at the time provide (section 3a, Act July 1, 1898, chapter 541, 30 Statute 546 [U. S. Compiled Statutes 1901, page 3422]) that "acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors," and, further (sections 60a, 60b, 30 Statute 562 [U. S. Compiled Statutes 1901, page 3445]): "A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property, * * * and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. If a bankrupt shall have given a preference within

four months before the filing of a petition, * * * and the person receiving it * * * shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." As it seems to us, the language employed in the act as thus quoted presents an all-sufficient answer to the contention that the mortgages in question may be voided on the ground of preference. It is the transfer of the property which is made an act of bankruptcy, and not the recording of the instrument of transfer, and the period of four months commences to run from the time of such transfer. *In re Wright* (D. C.), 96 Fed. Rep. 187; *Dean v. Plane*, 195 Ill. 495 (63 N. E. Rep. 274); *Miller v. Schriver*, 197 Pa. 191 (46 Atl. Rep. 926); *Bank v. Johnson*, (Neb.) 94 N. W. Rep. 837.

Conceding that there may be cases where the transfer cannot be said to be complete until the instrument of transfer has been filed for record, either because delivery is accomplished by such filing, or that it was intended that the transfer should not be complete until the filing of the instrument, yet no such question can arise from the record in this case. The mortgages were both executed and delivered at the same time, and it affirmatively appears that nothing was then nor was there afterwards anything said on the subject of the recording of the same. The plaintiff — a daughter of Hannah Murphy, and who lived at home with her mother — took possession of the instruments for her mother, and she testifies: "The only reason I can give for not recording sooner was that it was overlooked. The last few months of mother's sickness she needed so much attention that it was overlooked. I never thought of it being necessary to record. After mother's death I asked my attorney what to do, and he told me to record." Moreover, there is no evidence in the record from which the conclusion can be drawn that Mrs. Murphy had reasonable cause to believe that a preference, such as would be violative of the bankrupt act, was

intended. It does not appear that she was advised as to the fact of insolvency. At best, she knew that the defendants had some outstanding bills that were due, and that the holders were pressing for payment; that the money borrowed from her was wanted to liquidate such bills.

Counsel for appellees call attention to the amendment to subdivisions "a" and "b" of section 60, Act July 1, 1898 (chapter 541, 30 Statutes 562 [U. S. Compiled Statutes

1901, page 3445]), approved February 5, 1903, chapter 487, section 13, 32 Statute 799 [U. S. Compiled Statutes Supp. 1903, page 416], whereby the four-months clause is made to count from the date of the recording of the instrument, instead of from the date of the execution and delivery thereof; and further doing away with all question of belief on the part of the transferee. And it is contended that such amendment should be given application here upon the theory that the same simply recognizes and puts into form the rule theretofore existing. In our view, there is no force in the contention. The fact of the amendment makes it clear that the former rule should be construed according to the plain language thereof, and there is nothing in the amendment to indicate that it was intended to have a retroactive effect.

It is also suggested that section 3b of the bankrupt act (30 Statutes 546 [U. S. Compiled Statutes 1901, page 3422]), is authority for the general position of appellees. We are agreed to the contrary. The effect of the provision is simply to authorize the filing of a petition in bankruptcy at any time within four months after the recording of an instrument whereby a preference is sought to be accomplished. It is a statute of limitation fixing the time within which bankruptcy proceedings may be commenced. Sections 60a and 60b (30 Statutes 562 [U. S. Compiled Statutes 1901, page 3445]), provide what transfers may be avoided by the trustee. There is no conflict between the sections, and the intention is clear.

III. Section 67a of the bankrupt act (30 Statutes 564 [U. S. Compiled Statutes 1901, page 3449]) provides that

3. MORTGAGES:
avoidance;
rights of
creditors.

“claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of a bankrupt shall not be liens against his estate.” The subsection thus quoted has reference only to the validity of lien claims under the law of the State wherein the bankruptcy proceedings are pending. Collier on Bankruptcy, 481. In this State an unrecorded chattel mortgage is valid save as against subsequent purchasers and existing creditors, without notice. Code, section 2906. A creditor, existing as such at the time of the execution of the mortgage, must obtain a lien, as by attachment or otherwise, upon the mortgaged property, before notice, actual or constructive, of the mortgage, that he may avail himself of the benefit of the statute. *Allen v. McCalla*, 25 Iowa, 464; *Kern v. Wilson*, 82 Iowa, 407. A creditor who becomes such after the execution of a mortgage, and before notice thereof, may be heard to assail such mortgage on the ground of fraud in that he was induced to extend a credit that would not otherwise have been given. *Fox v. Edwards*, 38 Iowa, 215. The contention of appellees in the respect now under consideration may be disposed of by saying that the record makes it clear that no creditor had acquired a lien upon the mortgaged property prior to the filing of the mortgages for record, nor is it made to appear that any credit was extended to the defendants Murphy between the date of the execution of the mortgages and the date of the filing thereof.

IV. Lastly, we come to the question whether the trustee may be heard to attack the mortgages in question on the ground that the same were intended to hinder, delay, and defraud creditors. The subject comes within

4. SAME.

the provisions of section 67e of the bankrupt act of July 1, 1898, chapter 541, 30 Statutes 564 [U. S. Compiled Statutes 1901, page 3449], and a mere reading of the section furnishes the answer to the question. “All convey-

ances, transfers, * * * of his property * * * made or given by a person adjudged a bankrupt * * * within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, shall be null and void," etc. As we have seen, the mortgages in question were executed and delivered about six months before the filing of the petition in bankruptcy.

Having considered all the questions raised by the record, we conclude that the trial court was in error in setting aside the mortgages held by plaintiff, and in ordering the proceeds of the property paid over to the intervener, as trustee in bankruptcy. As the exact amount in the hands of the receiver appointed by the trial court does not appear from the record, the cause will be remanded for further proceedings in harmony with this opinion.—*Reversed.*

THE STATE OF IOWA, Appellee, v. B. D. REA, Appellant.

Criminal law: TRIAL BY JURY: WAIVER OF RIGHT. The right of a trial by jury is a constitutional guaranty which cannot be waived by a defendant in a criminal case, and a judgment entered on a trial to the court will be reversed on appeal.

Appeal from Emmett District Court.—HON. W. B. QUARTON, Judge.

WEDNESDAY, NOVEMBER 23, 1904.

THE opinion states the case.

PER CURIAM.—This case has been submitted upon a transcript of the record in the court below and without arguments of counsel. It appears that the defendant was indicted by the grand jury of Emmett county upon the charge of doing business as an itinerant physician without having procured a license for that purpose, contrary to the provisions

of Code, section 2581. Defendant demurred to this indictment on the ground that the statute referred to is unconstitutional so far, at least, as it applies to one who has been duly admitted to the practice of medicine under the laws of the State. The demurrer was overruled, and defendant entered a plea of not guilty. Thereupon, as the record recites, the parties agreed and consented to waive a jury, and to submit the cause to the court for its judgment upon an agreed statement of the facts. Trial was accordingly had to the court without a jury, and the defendant found guilty, and adjudged to pay a fine of \$300 and costs. The defendant has appealed from the judgment against him, and, although neither party has thought it worth while to favor this court with an argument, we are not at liberty, as we would be under like conditions in a civil action, to dismiss the appeal, but must inspect the record, and ascertain whether it shows any manifest error in the proceedings. As far back as the case of *State v. Carman*, 63 Iowa, 132, it was decided that the defendant in a criminal case cannot waive a jury or consent to trial by the court, and that judgment thus procured will be reversed on appeal. The substance of the holding there is that the court is wholly without jurisdiction to hear or try an issue of fact in a criminal case without the aid of a jury, and that the consent or waiver of the defendant does not estop him from taking advantage of the error. That case has since been followed and approved in *State v. Larrigan*, 66 Iowa, 426; *State v. Tucker*, 96 Iowa, 276; *State v. Douglas*, 96 Iowa, 308; *State v. Lightfoot*, 107 Iowa, 351. The provisions of our State Constitution (article 1, section 10) and of the statute (Code, section 5338) which were then deemed controlling of the question remain unchanged, and, while the decisions which we have cited were rendered by a divided court, the doctrine has been so long adhered to, and its propriety is so apparent, that we are not ready to approve the innovation.

The judgment of the district court is *reversed*.

ANTON ED ALQUIST V. EAGLE IRON WORKS, Appellant.

Master and Servant: EVIDENCE: AGENT'S DECLARATIONS. In a personal injury action, the statements of an agent of the defendant relating to the accident, not made while engaged in the performance of some duty pertaining to the matter to which the statements relate, and which involve a conclusion that the plaintiff was not guilty of negligence, were inadmissible in proving plaintiff's case and are held prejudicial, although under the record the same were competent on rebuttal.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

WEDNESDAY, NOVEMBER 23, 1904

SUIT to recover for personal injuries received while in the service of the defendant. There was a trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed.*

Dale & Harvison, for appellant.

Edmund H. McVey and *John G. Park*, for appellee.

SHERWIN, J.—This is an ordinary personal injury action, presenting the usual questions of negligence and contributory negligence, assumption of risk, correctness of the instructions, and assailing two rulings upon the introduction of evidence. Notwithstanding the simple character of the action, and the frequency with which the controlling questions involved are presented to this court, counsel for the appellant, with great labor and ability, have argued the case in chief in an argument of two hundred and fifty-three pages of solid matter, and in reply in thirty-five pages. The principal argument makes no pretense of complying with the rule

relating to the presentation of cases in this court, and the reply is but a feeble attempt in that direction. We assume that the main argument was prepared and printed before the publication of the rules in November, 1903, although it was not filed until the 9th of February, 1904; otherwise we should strike it from the files and affirm the case because not properly argued. As it is, we shall determine but one question presented, and shall tax a part of the cost of printing the arguments to the appellant, because of their unnecessary length.

The defendant is a corporation operated through its agents and the plaintiff at the time of his injury was employed to operate a stationary engine which was used for running the machinery in its foundry. He was directed by the appellant's manager to move a certain fan which was run by a belt, and in doing so he received the injury in question. On the same day, but several hours thereafter, and after the plaintiff had been removed to his own home, his wife went to the manager's office for the purpose of collecting the wages then due to the plaintiff for past services; and while there she was told by said manager, in answer to her question whether it was her husband's "fault that he got hurt," that it was not; "that he couldn't do it any other way. He was told to fix that thing." This conversation the plaintiff's wife was permitted to detail to the jury in her examination in chief, over the objection of the appellant. It is manifest that this statement of the manager had no relation to the payment of the money then due for the husband's services, and that it was incompetent, under the general rule, and under our own holding in *McPherrin v. Jennings*, 66 Iowa, 622. The latter part of the statement would have been competent in rebuttal of the testimony of the manager that he did not direct the plaintiff to move the fan, and were this, in effect, all that the statement amounted to, we would not reverse the case on account of the ruling, because it would then be a question of the order of introducing testimony, and nothing more. But

the statement was much broader than this, and involved his conclusion that the plaintiff was not guilty of contributory negligence in obeying his orders and in doing the work. That it was prejudicial to the appellant is clearly apparent.

To return to the appellant's arguments, we think it should be taxed the cost of printing at least two hundred pages thereof, and it is so ordered.

For the error in admitting the testimony referred to, the case is *reversed*.

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STATE OF IOWA V. THOMAS C. ROBINSON, Appellant.

Murder: POISONING: INDICTMENT. An indictment for murder effected

- 1 by means of a felonious administration of poison, need not allege a specific intent to kill.

Expert evidence: HYPOTHETICAL QUESTIONS. On a prosecution for

- 2 murder effected by strychnine poisoning, the admission of an answer to a hypothetical question, although based in part upon facts not clearly proven, was not prejudicial where the witness subsequently gave the same answer to a question from which the objectionable matter was eliminated.

Same. In a prosecution for murder by strychnine poisoning, it was

- 3 not prejudicial error to permit a hypothetical question to a chemist, containing a symptom which defendant claimed had not been proven, where the real purport of the question was whether the chemical analysis of the contents of the stomach would reveal strychnine provided death was due to such poisoning.

Examination of hostile witness. On a prosecution for murder where

- 4 the State's witnesses seek to avoid giving testimony tending to convict the defendant, the court may in its discretion permit the State's attorney to treat them as hostile and to cross examine them respecting their testimony before the grand jury.

Murder in first degree: EVIDENCE. On a prosecution for murder

- 5 based on the felonious administration of strychnine to an infant, the evidence is reviewed and held sufficient to sustain a conviction of murder in the first degree.

Appeal from Howard District Court.—HON. A. N. HOBSON,
Judge.

TUESDAY, DECEMBER 13, 1904.

DEFENDANT appeals from a conviction and sentence to imprisonment for life for murder in the first degree, committed by administering poison to an unnamed female infant, four days old.—*Affirmed.*

P. H. McHugh and Tom H. Milner, for appellant.

Chas. W. Mullan, Attorney-General, and Lawrence De Graff, Assistant Attorney-General, for the State.

MCCLAINE, J.—I. The indictment alleges that defendant, “in the county aforesaid, did willfully, unlawfully, and feloniously, and with malice aforethought, administer to and
1. POISONING: indictment. cause to be taken into the stomach of a certain girl baby, then and there being, aged about four days [and otherwise specifically described], a deadly quantity of a certain deadly poison called ‘strychnine,’ he, the said defendant, then and there well knowing the same to be in quantity and kind, as was administered and taken, a deadly poison, by the means of the taking of which deadly poison into the stomach and body of the said girl baby, she became then and there mortally sick and of which said mortal sickness on or about [the date named], at and within the county of Howard and State of Iowa, she died,” etc. It is contended that this indictment is fatally defective because it does not allege a specific intent to kill, but this objection is, we think, entirely without merit. The allegation of a specific intent to kill may be important where the acts themselves, as alleged, do not necessarily involve such an intent — as, for instance, in case of an assault with a deadly weapon, where, as it has been held, the allegation of intent to kill is essential, although, as a matter of evidence, such intent might be inferred from the act charged. *State v. McCormick*, 27 Iowa, 402. But killing by means of the will-

ful, unlawful, and felonious administration of poison is murder, and murder in the first degree. Code, section 4728. A homicide thus committed cannot constitute murder in the second degree or manslaughter, and therefore the specific intent to kill is not an essential allegation in the indictment. *State v. Van Tassel*, 103 Iowa, 9; *State v. Wells*, 61 Iowa, 629. The indictment follows the form given in Bishop's Directions & Forms, section 533, and we have not the slightest doubt as to its sufficiency. *Epps v. State*, 102 Ind. 539 (1 N. E. Rep. 491).

II. For the purpose of showing that the symptoms attending the illness and death of the infant indicated poisoning by strychnine, expert witnesses introduced for the

prosecution were asked as to whether certain hypothetical facts would, in their judgment, show that death occurred from that cause. The

2. EXPERT EVIDENCE: hypothetical questions.

objection interposed by the defendant to the hypothetical questions was that some of the symptoms assumed therein were not shown by the evidence to have existed. Without setting out at length the questions or the evidence on which they were predicated, it is sufficient to say that the principal objection was to the inclusion in the question of the throwing back of the head, as a characteristic symptom of convulsions due to strychnine poisoning, while it is contended that there was no evidence that the infant in question did throw back its head during its illness. It can hardly be said, however, that there was no evidence of such fact. One witness who was present said, "I just seen that it jerked that way, and held its head up that way, and rolled its eyes," and again that the infant, while being held, "kind of threw its head over that way. I never could remember the way that it throwed it over." As this testimony was evidently accompanied with gestures indicating the motion of the infant's head, we are not justified in saying that this evidence, as it went to the jury, did not indicate that the head was thrown backward. However this may be, two of the expert witnesses were after-

wards recalled, and a hypothetical question propounded, from which the throwing back of the head was eliminated as a symptom accompanying the illness, and they still testified that the symptoms described in the revised question indicated strychnine poisoning.

The only other expert witness called by the prosecution to whom the hypothetical question was put was the chemist, who had examined the stomach and intestines of the deceased

infant for traces of strychnine, and who testified that no such traces had been found. To him the hypothetical question was put, not with reference to whether the symptoms described indicated strychnine poisoning, but with reference to whether in a case of that character he would probably succeed in detecting strychnine by his examination if strychnine poison had been administered and caused the death. Now, while it might have been error to allow the hypothetical question to be propounded if it should be conceded that the symptoms of jerking the head backward had not been shown to have been observed, yet, as bearing upon the ability of the chemist to discover strychnine in the examination of the stomach and intestines, the error was wholly without prejudice. The real question asked and answered was as to the probability of the discovery of strychnine on such examination as was made, provided the death was due to strychnine poisoning. With reference to the inclusion in the hypothetical question of the jerking of the infant's head, it was plainly of no significance. No prejudicial error was committed by the court, therefore, in overruling defendant's objections to the hypothetical questions on this ground. There was much controversy during the trial as to whether certain other symptoms included in the hypothetical questions were indicated by the testimony, but it is sufficient to say that there was some evidence as to all the other symptoms relied upon.

III. It is contended that the court erred in allowing the prosecution to treat the witnesses introduced by it as hos-

tile witnesses and practically subject them to cross-examination with reference to the testimony given by them before the grand jury. It may be conceded that the method of examining these witnesses was rather unusual, but the court must be allowed a considerable discretion in such matters, and, if the witnesses appeared to be hostile, the method of examination pursued was permissible. Now, we think that the record before us shows that the State's witnesses were hostile to the prosecution, and sought, so far as possible, to avoid the giving of testimony which would tend to convict the defendant. Their relations with the defendant will appear from a fuller statement of the evidence given in a subsequent paragraph of this opinion, and it is sufficient here to say that, under the circumstances disclosed, we do not think that any ruling of the court with reference to the method of examining these witnesses constituted error.

IV. The instructions given are criticised at some length, but a careful consideration of the objections urged leads us to think that the criticism is without merit in any particular. As the points made in argument relate to small portions taken from various instructions, which cannot be fairly judged without setting out at length the entire paragraphs in which they are contained, we do not feel that we would be warranted in extending this opinion by the elaboration of our reasons for the conclusion that none of the objections urged are sound.

V. Finally it is argued with great apparent confidence that the verdict is not supported by the evidence, and, having now disposed of the somewhat technical objections to the proceedings on the trial, we come to a consideration of the facts which are substantially and satisfactorily established: The infant referred to in the indictment was one of twins, both of whom, having been in apparent good health from the time of birth, were suddenly taken sick on the fifth day after

4. EXAMINATION
OF HOSTILE
WITNESSES.

5. MURDER IN
THE FIRST
DEGREE: evi-
dence.

birth, and at almost exactly the same time in the evening. One of them died about midnight; the other, near daybreak the next morning. As already suggested in this opinion, the symptoms indicated death by strychnine poisoning. The defendant was unquestionably the father of these infants, who were born out of wedlock; and he had for more than a year prior to their birth been living with the parents of the infants' mother, she being an unmarried woman. During that period, defendant had, to the knowledge of this woman's parents, and in their home, sustained illicit relations with her, although he was known to have a wife living. No objection to this relation seems to have been made on the part of the young woman's parents, save that on one occasion her father threatened to compel the defendant to leave on account of his relations with the daughter, but was pacified by the assurance of defendant that he was going to get a divorce from his wife, and would then marry the daughter. Within the domestic circle the father and mother of these infants were practically treated as though they sustained the legitimate relation of husband and wife. On the afternoon preceding the first symptom of illness on the part of the infants, the defendant purchased strychnine in a drug store in a neighboring town, and, accompanied by a brother of the children's mother, returned to the family home, which he was making his home, although not, so far as appears, as employé or boarder. While he, with the other members of the family, was assembled in the kitchen, as was their apparent custom in the evening; and while the mother of the infants was frying meat on the stove for supper, one of the babies, which she was holding in her lap, according to her testimony, gave a jerk, which she says she thought was due to fat from the skillet flying in its face. She covered its face with a cloth, and gave it to her mother, and took up the other infant, which almost immediately exhibited the same symptoms. Her description of what subsequently took place up to the time the infants died is extremely meager and unsatisfactory. She

protests that she left them in the charge of her mother, and did not see them again but once until after they were both dead. Her father and her brother, who were also present, are equally vague in their testimony as to the care given to these babies; and the mother of the household, who seems to have had the principal charge of them during their sickness, died before the trial, so that her evidence is lacking. When the second baby was taken sick, a few minutes after the first indication of illness on the part of the first one, defendant indicated his belief that it was sick in the same way; and, after some time had elapsed, he made a remark indicating that, as they had not died already, they would probably recover. Nevertheless, before the father of the infants' mother retired for the night, defendant conversed with him as to where the babies should be buried if they died, and the next day procured lumber, with which he constructed a rude box, in which the bodies were placed; and that evening after dark, in a buggy hired by him from the livery stable, accompanied by the father and brother of the infants' mother, defendant took this box to the cemetery and buried it. From the time the twins were born until after they were buried, no doctor was called, and no neighbor was advised either of the birth of the children or of their death, and the first steps towards securing publicity were taken by neighbors whose curiosity had been aroused. True, the illegitimacy of the infants might explain the omission of the usual announcement to neighbors and friends of their birth; but, if it was intended that they should live, it would not explain failure to call a physician or outside assistance. On the other hand, the relation of the defendant to these illegitimate babes would furnish a possible motive to be taken into account in seeking an explanation for his conduct. Defendant testified as a witness, but threw no particular light on the circumstances above detailed. He attempted to explain the purchase of the strychnine, however, by testifying to a conversation with a man for whom he had been working occasionally in regard to

the poisoning of gophers and ground hogs; and he claimed that, being referred by this man to his wife for strychnine, he was told by her that she had none, and that he could get some at the drug store. This, as defendant testifies, took place on the very afternoon when the strychnine was procured, and the testimony of the wife lends some corroboration to his story that he asked her for strychnine, although her husband was quite positive that he did not remember any conversation with defendant in regard to the poisoning of gophers and ground hogs. While defendant was in custody he gave the same explanation of the procuring of the strychnine, and asserted that he had put it on corn in gopher holes in the woods; but, when asked to go with the officer and point out the places where he had put the corn, he refused to do so, assigning as a vague excuse the difficulty of finding the places. These circumstances, however, have really nothing to do with the case against the defendant. He procured and had in his possession this strychnine before the children were taken sick, and had the opportunity to administer it to them, for they were fed several times from milk mixed with water kept for that purpose, and it appears he assisted in caring for them. They were taken sick almost simultaneously with symptoms not simply consistent with, but, by the testimony of experts, strongly indicative of, strychnine poisoning. No effort was made by defendant to call assistance, his curiosity as to the nature of their serious illness seems not to have been aroused, and he apparently regarded it from the first as likely to terminate fatally, until after the lapse of two or three hours he expressed the thought that the babes might get over it. It is true that the prosecution rests on circumstantial evidence, but we think the circumstances amply justified the jury in the finding that the death of the infants was, beyond a reasonable doubt, due to the criminal act of defendant, and that he was therefore properly convicted.

The judgment of the trial court is therefore *affirmed*.

STATE OF IOWA V. J. E. MCPHERSON, Appellant.

Burglary: OBJECTION TO GRAND JURY: WAIVER. A defendant held to

- 1 answer before the return of an indictment who fails to appear and challenge the grand jury, although at an adjourned term, waives any objection to the selection and drawing of the jury.

Burglary: EVIDENCE. In a prosecution for burglary, evidence exam-

- 2 ined and held to sustain a verdict of guilty.

Appeal from Page District Court.—HON. W. R. GREEN,
Judge.

WEDNESDAY, DECEMBER 14, 1904.

THE defendant was convicted of the crime of burglary, and appeals.—*Affirmed.*

W. P. Ferguson and Earl R. Ferguson, for appellant.

Charles W. Mullan, Attorney-General, and *Lawrence De Graff*, Assistant Attorney-General, for the State.

LADD, J.—The accused was arrested on preliminary information, and being held to answer at the next term of the district court, convening December 8, 1903, was released upon the execution of an appearance bond. An

1. OBJECTION TO
GRAND JURY:
waiver. order had been entered by the presiding judge, postponing that term until January 5, 1904, because of sickness. At the convening of the court the grand jurors drawn in 1903 appeared, and from these the grand jury which returned the indictment was selected and impaneled. The defendant, though called, failed to appear, and was held to "have waived all objections to the grand jury." The indictment was returned January 13, 1904, and on the 24th day of February, the defendant moved that it be set aside on the ground that the period during which the

jurors composing the grand jury might serve as such had expired January 1st previous to the finding of the indictment. Authority to postpone the term is conferred on the judge who is to preside by section 235 of the Code, and under the provisions of section 237 the defendant was required to appear at the adjourned term. The opportunity of challenging the panel was open to him at that time, and by failing to exercise the right he waived all objection to the selection and drawing of the jury. Sections 5321, 5241, Code; *State v. Ingalls*, 17 Iowa, 8; *State v. Dixon*, 3 Iowa, 416. Having waived the irregularity, if any there was, it is scarcely necessary to add that he was not in a situation to avail himself of it as a ground of a motion in arrest of judgment. It must not be inferred that we regard the point raised as well taken. But for some slight changes in the language of the statutes *State v. Winebrenner*, 67 Iowa, 230, is an authority to the contrary. All we now hold is that appellant, having waived the objection, could not urge it after the return of the indictment.

II. That some one removed two lights and the cross-bar from the back window of Huldah Ohlssen's millinery store in Essex, leaving an open space $12\frac{3}{4}$ by 28 inches, is put beyond doubt by the evidence. She had

2. BURGLARY:
evidence. bolted the doors and nailed down the windows, and covered the latter with boards before leaving in July, and upon her return in December she found the window as stated, the bolt removed from the back door, and the latch turned. Considerable ribbon had been taken; also a jewelry case with some jewelry. Some silk mittens, ties, velvet ribbons, and plumes had been taken from the places where she had left them and packed in a pasteboard box and put on an empty shelf. The defendant owned the adjoining building, and in connection with George Haepner, had been operating a restaurant there from March until the fore part of December. They were succeeded by one Priest for a few days, and then by Conrad, who con-

ducted a shooting gallery therein. About the middle of the month Conrad found a lady's astrakhan cap in a box at the back end of the building. This belonged to Huldah Ohlssen, and had been left in her store when closed in July previous. One Tutt orally leased the building of defendant in December (and subsequently turned it over to Conrad), and upon his return to Shenandoah had a talk with the defendant, who, according to Tutt's testimony, said, "There was another graft close to me that could be worked"—a millinery stock; that there was some money in it; that he had been in the building, and had a box of goods over in their place; that "we had a box of goods in the place, and George's heart failed him, and we took it back." The defendant admitted telling Tutt that the back door of the millinery store was unlocked, but otherwise denied having made the statements. He admitted that two boxes, one with the cap in it, had been in their restaurant, but testified that Haepner had confessed having entered the store and taken them, and had, on his advice, promised to return them. He denied all connection with the crime, and declared that, as he was a large man, weighing two hundred and twenty-six pounds, he could not have entered through the space left in the window. We have set out the evidence somewhat in detail, because appellant relies mainly on its insufficiency for a reversal. We think it was enough to have carried the case to the jury. If Tutt told the truth as the jury must have thought, the defendant admitted having been in the store, and this under circumstances indicating that it happened during the absence of the proprietor; also that he was interested with Haepner in the possession of the box of goods taken therefrom. Other evidence tended to show that he could have gone through the window; but, even were this impossible, he might, for all that appears, have entered by opening the door. Whether he broke and entered, or aided and abetted Haepner so to do, was for the jury to determine, and we are not inclined to interfere with its conclusion. The evidence was such as to

call for an instruction as to whether he was guilty of aiding and abetting another in the commission of a crime. The ruling respecting a conversation of one Preston with Haepner about shipping two trunks of the latter to Red Oak were proper, as the relevancy of the testimony was not disclosed by the interrogatories or otherwise.—*Affirmed.*

DEMPSTER MANUFACTURING COMPANY v. E. S. DOWNS,
Defendant, and M. MULLEN, Appellant.

Corporate stock: LIENS: NOTICE. A corporation may create a lien on the stock of any holder thereof, to secure the amount of his liability to the corporation, by a provision to that effect in its articles of incorporation; and the lien so created will be valid as against third persons, though without actual notice thereof.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

WEDNESDAY, DECEMBER 14, 1904.

ACTION on note and account against E. S. Downs, with prayer that amount found due be enforced as a lien against his stock in the plaintiff company. This stock was assigned to the defendant Mullen as security for some loans, and he resisted the establishment of any lien in favor of plaintiff, and prayed that its officers, who were made parties, be compelled to transfer the stock to said Mullen on the books of the company. Judgment was entered against Downs as prayed, and the relief sought by plaintiff granted. Mullen appeals.—*Affirmed.*

Dale & Harvison, for appellant.

Dudley & Coffin, for appellee.

LADD, J.—The Dempster Manufacturing Company was incorporated September 1, 1897, with a capital stock of \$100,000, divided into shares of \$100 each. Of these, 10 shares were issued to the defendant E. S. Downs. The certificates were to the effect that the shares were “fully paid and nonassessable, transferable only on the books of the corporation in person or by attorney on surrender of the certificate,” and the eighth article of incorporation reads, “The corporation shall have a lien upon the stock of any holder thereof for the amount of his liability to the corporation, and this lien shall not be discharged by a transfer of the stock except on a written resolution of the Board of Directors authorizing the transfer.” On the 18th day of September, 1900, for full consideration, Downs executed his note to the company for \$431.35, payable in one year, at 6 per cent. interest. In April, 1901, he entered into a contract with the company under which he was to handle its goods at New Ulm, Minn., on condition that these remained the company’s property until paid for, and that the proceeds belonged to it. Goods on hand were returned to the company in the fall, and he is shown to have been indebted to it for a balance of \$249.07 on December 12, 1901. Though questioned, the existence of the indebtedness to the company, not as assignee, as stated, is fully established by the evidence. On the 21st day of January, 1902, a dividend of \$50 was declared on the stock, and this was applied by the company on the account. On the other hand, Downs borrowed \$200 of the Citizens’ Bank of New Ulm, Minn., on the 29th day of July, 1901, and, to secure the same, indorsed each certificate of five shares of stock: “For value received, I hereby sell, assign and transfer unto M. Mullen the five shares of the capital stock represented by the within certificate and do hereby irrevocably constitute M. Mullen my attorney to transfer the stock on the books of the within named corporation with full power of substitution in the premises. Dated July 29, 1901, E. S. Downs.”

Another loan of \$200 was procured in the same way August 14th following; another, of \$300, September 12th; and on October 12, 1901, still another, of \$50. These loans were made in reliance upon the stock as security, and without any actual notice of the provisions of article 8 or of the plaintiff's claims. Neither did the company have any knowledge whatever of these loans, or of the assignment and delivery of the certificates, until so advised by a letter from Mullen dated December 21, 1901.

The only question raised by the record is whether the plaintiff is entitled to enforce a lien for the indebtedness of Downs to it against the stock. At common law a corporation had no lien upon the shares of its stockholders for debts due from them to the company. Secret liens, as they impede the safe and speedy transfer of property, are always discouraged; and courts uniformly refuse to enforce the same, as against stock, unless created by statute, charter, or by-law of the company. *The Farmers' & Merchants' Bank v. Wasson*, 48 Iowa, 336. Our statutes are silent on the subject, but the powers which may be exercised by a corporation in effecting its objects are as broad and comprehensive as those of an individual unless expressly prohibited. *Thompson v. Lambert*, 44 Iowa, 239. See sections 1607, 1609, Code. Corporations are formed in this State by the adoption of articles of incorporation in pursuance of the general laws enacted by the Legislature, and such articles, in connection with the statutes, answer the same purpose as a special charter. They contain the terms of agreement between the company and its stockholders, and indicate the business to be transacted, and also the grant from the State of the franchise or right of forming the corporation and attaining the objects contemplated. The same rules of construction apply to articles of incorporation so adopted in pursuance of general laws as to charters granted by the special acts of the Legislature. *State v. Central Iowa Ry. Co.*, 71 Iowa, 410; Morawetz on Private Corp., section 318.

Provisions in special charters granted by the Legislature, declaring any indebtedness owing by the stockholder to the corporation a lien on his stock, are not unusual, and are enforced by the courts. *Union Bank of Georgetown v. Laird*, 2 Wheat. 390 (4 L. Ed. 269). A similar provision, when embodied in articles of incorporation, is neither inconsistent with the statutes, nor opposed to public policy. By accepting the stock in the corporation every stockholder assents to the terms and conditions found in the articles. Such lien is not prohibited, and may be created by the articles of incorporation. *Bradford Banking Co. v. Briggs & Co.*, 31 Ch. Div. 19; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Bohmer v. City Bank of Richmond*, 77 Va. 445; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; 1 Cook on Stockholders, section 522; Hillwell on Stockholders, section 166. Whether this may be accomplished by the enactment of a by-law is a controverted question, concerning which the authorities are in sharp conflict, but this court is committed to the doctrine that such power exists. *Farmers' & Traders' Bank v. Haney*, 87 Iowa, 101; *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa, 204. The main contention is that, though the lien existed as between the company and the stockholder, this would not affect the interest in the stock acquired by a third person without notice. That such is the rule with respect to liens created by by-laws was recognized in the decisions last cited. The by-laws of a private corporation are not in the nature of legislative enactments, so far as third parties are concerned. They are mere regulations or self-imposed rules for the management and control of the corporate affairs, and are not usually intended for strangers who do not subject themselves to their influence. But it is different with the provisions of the charter. The corporation is created by the adoption of the articles. These form the very basis of its existence. Every one who deals with it or its stock is charged with knowledge of their contents. To the end that the greatest publicity may be attained, as a

condition precedent to commencing business they are required to be recorded in the office of the recorder of deeds in the county where its principal place of business is to be kept, and filed and recorded with the Secretary of State. Counsel concede that where the lien is created by a general statute, or the provision therefor is a part of a special charter granted by the Legislature, it is enforceable against the whole world. This is because all are charged with knowledge of the law as contained in the Public Acts of the Legislature. For the same reason, every one who acquires certificates of stock must be assumed to know that they were issued by virtue of articles of incorporation, and that these may be found in the office of the Secretary of State. Indeed, the very object of requiring the filing and recording the articles is to give them the same publicity, as nearly as may be, as statutory charters, and render them easily accessible to all who may be interested in ascertaining their contents. These articles are expressive of the relative obligations of the company and stockholders, and inhere in the certificates of stock, in whosoever hands they may come. The certificates are undoubtedly continuing assurances of ownership, but the ownership is such as is stipulated in the articles. Says Morawetz in his work on Corporations: "If the lien is provided by the company's charter or articles of association, or by general law, all persons purchasing shares are bound thereby, and must, at their peril, inquire of the company's officers whether the holders of the shares are indebted to it or not." See, also, Jones on Pledges, section 221 *et seq.* Moreover, section 1626 of the Code provides that "the transfer of shares is not valid, except as between the parties thereto, until regularly entered upon the books of the company"; and, in construing this language in *The Ottumwa Screen Co. v. Stodgill*, 103 Iowa, 437, the court held that such invalidity was not dependent on the absence of notice. In the instant case, however, the entire indebtedness to plaintiff had accrued prior to any information of the transfer to

Mullen reaching the company. We think the interest so acquired was subject to the lien of the company for the indebtedness owing it, and that this attached to the dividend declared during its existence. Angell & Ames on Corporations, section 355; 2 Cook on Corporations, section 526.—*Affirmed.*

JOHN NEWBURN V. HIRAM LUCAS, Appellant.

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| 126 | 85 |
| 143 | 148 |

Deeds: BREACH OF COVENANTS: DAMAGES. In an action for breach

1 of covenants of warranty without reservation, a statement of the grantee's agent in procuring the deed which was made to the grantor, that it was the custom of the grantor to retain the crops where the conveyance was not made until after July 1st, upon which the vendor did not rely, and it further appearing that there was no agreement between the vendor and vendee that the crops should be reserved; held that the grantee was entitled to damages for failure to secure the crops, although the agent's statement may have been within the scope of his authority.

Judgment on the pleadings. A verified answer and counterclaim will
2 not be taken as true and judgment rendered thereon, because of an unverified reply. The proper practice is a motion to strike.

Appeal: OBJECTION TO PLEADINGS. The insufficiency of a pleading
3 which states a cause of action, cannot be first assailed in the appellate court.

Appeal: PLEA IN BAR. One who has not pleaded a judgment in bar
4 of the action cannot raise the question on appeal.

Deeds: BREACH OF COVENANTS. An action on the covenants of a deed
5 cannot be defeated by parole evidence of the grantee's knowledge of an incumbrance.

Conveyances: GROWING CROPS. Unmatured crops receiving nourish-
6 ment from the soil pass with a conveyance.

Damages: GROWING CROPS. In an action for breach of covenants of
7 warranty in a deed for the loss of growing crops, the measure of damages is the value of the crops at the time of the conveyance.

Lien for damages. Where plaintiff and his grantor exchanged lands,
8 and there was a breach of warranty as to the crops under the covenants in the grantor's deed, plaintiff was entitled to a lien for his damages on the land conveyed to the grantor.

Damages: FAILURE TO PAY TAXES. Where it clearly appears from the deed itself that it was the intent of the parties to except taxes from the covenants of warranty, the grantee is not entitled to damages for the grantor's failure to pay the same.

Appeal from Polk District Court.—HON. JAMES A. HOWE, Judge.

WEDNESDAY, DECEMBER 14, 1904.

SUIT in equity to recover damages for the breach of the covenants of warranty in a deed, and asking that the damages awarded be made a lien upon the property deeded to the appellant in exchange for the land conveyed to the plaintiff. The defendant counterclaimed for a breach of warranty, and asked the reformation of the conveyance to the plaintiff. Judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

Henry H. Griffiths and Blake & Blake, for appellant.

C. C. Cole, for appellee.

SHERWIN, J.—The deed from the appellant to the plaintiff contains the usual covenants of warranty, without reservation of any kind. At the time the conveyance was made — July 8, 1901 — the appellant's grantor was in possession of the land, and entitled so to remain until the following March. He had also reserved the growing crops, and was entitled thereto at the time of the appellant's conveyance to the plaintiff. The evidence is not sufficient to warrant the reformation of the deed; it is not the clear and convincing evidence necessary to overthrow a written instrument.

The judgment record in the plaintiff's action against the defendant's grantor does show that Shepherdson was acting as the plaintiff's agent in negotiating the transfer of properties, and it is true that the knowledge thus acquired by him,

1. DEEDS:
breach of
covenants;
damages.

and the agreement made by him within the scope of his authority, will bind the plaintiff. But conceding this, and the fact that when the trade was pending he stated that when a conveyance of land was made after the 1st of July it was the custom for the grantor to retain the growing crop, the defendant did not rely upon the statement, according to his own testimony, nor does it appear that there was any agreement between the plaintiff and Lucas relating to a reservation of the crops and possession for the use and benefit of Hail. *Gerald v. Elley*, 45 Iowa, 322.

There is no merit in the appellant's claim that he was entitled to a judgment on the pleadings. Notwithstanding the verification of his answer and counterclaim, the allegations thereof cannot be taken as true because of an unverified reply. *Wright v. Marsh*, 2 G. Greene, 94; *Taylor v. Runyan*, 9 Iowa, 522; *Wolff v. Hagensick*, 10 Iowa, 590. Advantage of an unverified pleading can only be taken by a motion to strike. *Rush v. Rush*, 46 Iowa, 648.

And, if the reply was not as specific as the appellant thought it should be, a motion to have it made more specific was the remedy. The petition states a cause of action, and not having been assailed in the court below, it is now too late to raise a question as to the sufficiency of its allegations.

The adjudication pleaded therein was for the purpose only of recovering the costs of that suit and of showing disseisin. The appellant did not plead that judgment as a bar to this action, and cannot now be heard on the question.

There was a breach of warranty in this case, without doubt; indeed, we do not understand that it is seriously contended otherwise. It may be conceded that the plaintiff had full knowledge of Hail's rights under his agreement with the appellant, and still he is entitled to recover. In an action of covenant

2. JUDGMENT ON
THE PLEAD-
INGS.

3. APPEAL: ob-
jection to
pleadings.

4. APPEAL: plea
in bar.

5. DEEDS: breach
of covenants.

the deed governs, and the grantor cannot defeat the covenant by parol evidence of the grantee's knowledge of an incumbrance. *Barlow v. McKinley*, 24 Iowa, 69; *McGowen v. Myers*, 60 Iowa, 256; *Van Wagner v. Van Nostrand*, 19 Iowa, 422.

At the time of the appellant's conveyance to the plaintiff, the corn and onions were unmaturing and receiving nourishment from the soil; they were therefore a part of it, and were conveyed by the deed to the plaintiff. *Straw-growing crops. hacker v. Ives*, 114 Iowa, 661; *Hecht v. Dettman*, 56 Iowa, 679; *Stanbrough v. Cook*, 83 Iowa, 705; *Downard v. Groff*, 40 Iowa, 597.

The serious contention arises over the measure of the plaintiff's damages. The trial court allowed him the value of the corn and onions at the time of the conveyance, as we understand the record, and we think this the rule that should be applied in this case. The purpose of the law is to give to an injured party full and adequate compensation for his injury, and hence it is that no rule of damages can be declared which will meet the requirement in all cases. It has been held by this court, and we think it the general rule as well, that in an action upon a covenant against incumbrances, where there is an outstanding lease, the measure of damages is ordinarily the rental value of the land for the unexpired term. *Wragg & Son v. Mead*, 120 Iowa, 319, and cases cited. But in that case the damages claimed were for the use of the premises for a special purpose, and this was also true in *Alexander v. Bishop*, 59 Iowa, 572. In case the incumbrance has been paid by the grantee, the measure of his recovery is the amount paid. *Guthrie v. Russell*, 46 Iowa, 269. It is the general rule, also, that, where only a portion of the land is lost, there may be a recovery of a portion of the consideration. *Mischke v. Baughn*, 52 Iowa, 528; *McDunn v. The City of Des Moines*, 39 Iowa, 286. See, also, cases cited in 11 Cyc. 1172. In *Van Wagner v. Van Nostrand*, *supra*, we held

that a grantee could recover the value of a barn which had been removed from the premises by a tenant under an agreement with the grantor. Where the title to fixtures fails, their value may be recovered. *Grose v. Hennessey*, 13 Allen (Mass.) 389. The underlying principle in all cases of this kind is that the damages should be estimated according to the real injury arising from the breach of the covenant, and it is manifest that, when crops have reached the point where they have a distinct value of their own as a part of the soil, it is no injustice to the grantor to treat them as a building or any other fixture would be treated, and to allow the value thereof, if it can be ascertained, upon a breach of the warranty. This amounts to no more than a recovery of "the difference in value between the property in the condition it was covenanted to be and its actual condition," and is a proper measure of damages. 2 Sutherland on damages, 278; *Blanchard v. Blanchard*, 48 Me. 174; *Hall v. Gale*, 20 Wis. 308.

It is contended, however, that there is no competent evidence to support this measure of damages. It must be conceded that the plaintiff's evidence on this question is somewhat doubtful, at least, but the defendant's own testimony fixes the value of the corn and onions at about the same price fixed by the plaintiff and his witness. The plaintiff is entitled to a lien on the land conveyed to the appellant. *McDole v. Purdy*, 23 Iowa, 277; *Brown v. Byam*, 65 Iowa, 374.

The appellant is estopped by his pleadings from claiming a breach of the covenants of the deed to him; but if such were not the case his own testimony on the subject would defeat recovery, for he says in substance that he told the tenant that he might remain.

The deed from the plaintiff to the appellant recited that the land was free and clear of incumbrances, except taxes, and covenanted against the "lawful claims of all persons whatsoever, taxes." The exception and the word "taxes," where

8. LIEN FOR
DAMAGES.

used the second time, were written into the deed. The intent

9. DAMAGES: of the parties clearly appears from the deed it-
failure to pay self, and we think the appellant's claim for taxes
taxes. paid was properly denied.

The judgment is *affirmed*.

JAMES VYSE, Appellee, v. THE CHICAGO, BURLINGTON AND
QUINCY RAILWAY Co., Appellant.

Railroads: CONSTRUCTION OF BRIDGES: FLOODS: INSTRUCTIONS. Where

1 a railway company was authorized to construct its road over
streams in such manner as not to unnecessarily impede their flow
and an issue of unnecessary obstruction was submitted, an instruc-
tion that defendant might, without liability, obstruct the stream so
far as reasonably necessary to maintain its bridge in a safe condi-
tion, was as favorable as defendant was entitled to.

Same. Unless the negligent act of a railway company in constructing

2 a bridge was the producing cause in flooding plaintiff's land, it
was not liable for the injury. The court's instructions when con-
strued together, are held correct.

Same. Where an action for damage caused by flooding plaintiff's land

3 was submitted on the theory that defendant's negligent construc-
tion of its bridge caused the overflow, and the court instructed
that unless the same caused the water to flow over plaintiff's land
he could not recover, failure to specifically cover the question of
whether the flood which did the injury was surface water, was not
error.

Appeal from Fremont District Court.—HON. O. D.
WHEELER, Judge.

WEDNESDAY, DECEMBER 14, 1904.

ACTION at law to recover damages for the flooding of
plaintiff's land, due, as is alleged, to the negligence of the
defendant in leaving certain piles in a natural stream crossed
by one of its bridges and to the negligent throwing of rocks
and stones therein. Many defenses were pleaded, which will
be noticed in the body of the opinion. On the issues joined,

the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.— *Affirmed*.

H. J. Nelson, George E. Draper and T. S. Stevens, for appellant.

W. E. Mitchell and R. C. Campbell, for appellee.

DEEMER, C. J.— Defendant operates a line of railway from Council Bluffs to Kansas City. Just over the State line in Missouri it crosses the Nishnabotna river. Prior to the year 1898 the bridge crossing this stream consisted of two spans, aggregating two hundred and six feet in length. In the year 1898 it replaced this bridge with another of three spans, aggregating three hundred and fifteen feet in length. In constructing this new bridge a number of piling were driven in the channel of the river, and when the bridge was completed these piling were cut off so that the ends thereof projected some distance above the bed of the stream, where they remained down to the time of the flood of which the plaintiff complains. After the construction of the new bridge, the defendant also threw into the channel of the stream, and around the center pier of the bridge which has always been at practically the same place, several car loads of stone and broken rock. Plaintiff owns land in the river bottom in this State some distance above the bridge, and he claims that it was overflowed and damaged in the year 1902 by reason of the piling left in the stream, which gathered debris of various kinds, and of the stones cast into the stream, which obstructed the natural flow of the water. The issue as to the faulty construction of the original bridge, and the insufficiency of the new one to carry the water of the stream, was not submitted to the jury. The sole matter left to its determination was the presence of the piling and the stones. Defendant pleaded, however, that the piling and the stones were necessary to the protection and maintenance of the second bridge, and were not such as to

unnecessarily impair the usefulness of the stream. It further pleaded that the flooding of plaintiff's land was due to an unprecedented flood, or, as it is sometimes called, "the act of God." These issues were submitted to the jury, resulting in the verdict hitherto stated. Many alleged errors are relied upon for a reversal of the judgment thereon, to such of which as are deemed important we shall now give attention:

Defendant complains of the trial court for not sustaining its motion for an instruction directing the jury to find a verdict for it. This complaint is without merit. There was enough testimony, if believed by the jury, as to the unnecessary obstruction of the river, to justify the court in submitting the matter as a question of fact. It is also contended that the flooding of the plaintiff's land was due to dikes or levees constructed by him and others. This question was also submitted to the jury, and it was told, in effect, that if these dikes or levees, in conjunction with the natural contour of the country, held back or retarded the flow of the flood waters, and caused them to accumulate north of plaintiff's land, he could not recover. The approximate cause of the flooding of plaintiff's land was properly submitted to the jury.

Further, it is argued that whatever damage plaintiff suffered was due to surface water caused by an extraordinary and unprecedented flood, and that defendant was not responsible therefor. This issue was also submitted to the jury, and there was such a conflict in the testimony, or in the inferences to be drawn therefrom, as to justify such submission.

The bridge is in Missouri, and the laws of that State provide, in substance, that railways may construct their roads over streams in that State, but that they shall restore the stream to its former state, or to such state as

1. CONSTRUCTION
OF BRIDGES:
floods;
instructions. not unnecessarily to impair its usefulness. The trial court submitted the question as to whether or not the defendant so restored the stream as not to unnecessarily impair the usefulness thereof.

The jury was also instructed that the defendant had the right to make its bridge permanent and safe, and in so doing might obstruct the channel of the river, so far as the same was reasonably necessary to maintain the bridge in a safe condition, without liability to the plaintiff or to any one else. These instructions were as favorable to the defendant as it was entitled to. *Booth v. R. Co.*, 140 N. Y. 267 (35 N. E. Rep. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552).

The jury was further instructed that the flood was "the act of God," and that defendant was not liable unless it were shown that its negligence combined with the flood in producing the injury of which plaintiff complains.

2. SAME.

In other instructions, the jury was told that negligence of the defendant contributing in some slight degree to bringing about the flood on the plaintiff's land would not be sufficient to render it liable, and also that defendant's negligence contributing in any degree to the bringing about of the damages would not be sufficient, unless such negligence was the producing cause of the injury. This was also explained in other instructions which told the jury, in effect, that if the flood were such as that plaintiff would have suffered damage had defendant not have been negligent, then he could not recover. These instructions, taken as a whole, were not erroneous. *Wolf v. Am. Exp. Co.*, 43 Mo. 421 (97 Am. Dec. 406); *Cornish v. R. Co.*, 49 Iowa, 378. Where negligence concurs with the act of God in producing an injury, the party guilty of the negligent act is responsible, provided the injury would not have happened but for such negligent act. *Langhammer v. City*, 99 Iowa, 295; *Baltimore Co. v. School Dist.*, 96 Pa. 65 (42 Am. Rep. 529); *Coleman v. R. Co.*, 36 Mo. App. 476; *Ulrick v. Dakota Co.*, 3 S. D. 44 (51 N. W. Rep. 1023).

The court instructed that "plaintiff's lands were injured to some extent by overflow from the Nishnabotna river." As the evidence was without conflict on this point, there was no error here.

Defendant's counsel also argue that the court did not submit the question as to whether or not the flood which did the injury was surface water. True, this point was not specifically covered; but the case was submitted *s. SAME.* wholly on the theory that the obstructions in the channel of the river caused it to overflow and flood plaintiff's land, and the jury was told that, unless these obstructions caused the water to back up and overflow plaintiff's dike at the north and east of his land, he could not recover. They were also instructed that if the dikes held back the water, and caused the flood waters to accumulate north of plaintiff's land, and finally to overflow the dikes or levees, then plaintiff could not recover. These instructions met every issue and all the testimony in the case, and the instruction asked by the defendant with reference to surface water was not correct in law. Surface water is not necessarily all that is outside of the main channel of a river. *Sullens v. R. Co.*, 74 Iowa, 659; *Moore v. R. Co.*, 75 Iowa, 263; *Cornish v. R. Co.*, 49 Iowa, 378.

Other instructions asked by the defendant were, in effect, given by the court in its charge.

Some other matters are complained of — as that the court failed to define the term “proximate cause,” and failed and neglected to number the paragraphs of its instructions. There is no merit in any of them.

The case was peculiarly for a jury, and with its findings we are not disposed to interfere.—*Affirmed.*

MARGARET CARPENTER, Administratrix, etc., Appellant, v.
THE CHICAGO, ROCK ISLAND & PACIFIC RAIL-
WAY COMPANY, Appellee.

Railroads: NEGLIGENCE: EVIDENCE. In an action for the death of a
1 railroad contractor, evidence of conversations between a train
dispatcher and a telegraph operator with reference to requiring

trains to slow down as they approached the work, was inadmissible on the question of the company's negligence, it appearing that the dispatcher was connected with another division of the road and there being no showing of authority or that anyone in authority had knowledge of the work.

Negligence: WARNING: PROXIMATE CAUSE. Where one was fully advised and knew of the impending danger from an approaching train, and death resulted from his failure to avoid the accident, negligence of the company could not be predicated on the failure of the engine men to ring the bell or sound the whistle, it appearing that the duty to so warn the deceased did not arise until after he knew of the danger; such failure was not the proximate cause of the injury.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

WEDNESDAY, DECEMBER 14, 1904.

ACTION by plaintiff, as administratrix of the estate of L. C. Carpenter, deceased, to recover damages for personal injury to her intestate, resulting in his death. The material facts respecting the accident are not involved in controversy. It appears that Carpenter and one Sisley were engaged in filling with earth the west end of a bridge near the station of De Soto, on the line of the defendant's railway. The earth for the purpose was being obtained from the right of way adjacent to such bridge. The method of procedure was by plowing up the earth, using a span of horses and a common plow therefor, and by then taking up and transporting the earth by means of wheeled scrapers. Carpenter was struck by a passenger train approaching from the west, and instantly killed. The circumstances of the accident are detailed by Sisley—he being the only witness testifying thereto—as follows: Carpenter started to do some plowing, and, when about two hundred feet west of the bridge, he undertook to cross the railway track from north to south with his team and plow. He had a boy driving the team, and he (Carpenter) was holding the plow. In some way

the point of the plow ran under the north rail, between the ties; and the team — a span of vicious horses — kept on pulling until the rail became wedged in between the point and the beam of the plow. The witness says that the train from the west was due, and they were expecting it; that from where he stood down at the bridge he heard it coming, and, looking up, saw it come around a curve in the track between six hundred and seven hundred feet west of where Carpenter, the boy, and the team were; that he called to Carpenter to look out for the train, whereupon the boy threw the lines to Carpenter, and ran away; that Carpenter seized the lines and tried to pull the horses off the track, and, failing in this, he ran around to the heads of the horses, and began beating them back off the track, and succeeded in doing so, but failed on his own part to get off the track and save himself. On motion, at the close of the evidence for plaintiff, there was a directed verdict in favor of defendant, and judgment against plaintiff for costs. Plaintiff appeals.—*Affirmed.*

McLennan & Brennan, for appellant.

Carroll Wright and J. I. Dille, for appellee.

BISHOP, J.— One ground of the motion to direct a verdict was that there was no proof of any negligence on the part of defendant which was the proximate cause of the accident and injury. The acts of negligence as charged in the petition may be summarized thus: First, that the train in question was being run at a speed of more than sixty miles an hour, whereas the defendant, through its officers and agents, had promised and agreed to slow down all trains as they approached the bridge; second, that no warning by whistle or bell of the coming of the train was given to employes working at said bridge; third, that at a point about three hundred feet west of the bridge a whistle warning should have been

given for a highway crossing the track about three hundred feet east of the bridge, and none such was given.

I. In respect of the ground of negligence first stated, it will be sufficient to say that the evidence wholly fails to show that a promise or agreement had been made as alleged.

1. NEGLIGENCE:
evidence.

Plaintiff attempted to prove by Sisley conversations upon the subject between himself and Carpenter, on the one hand, and one Gibney, a train dispatcher in Des Moines, and also the telegraph operator at De Soto, on the other hand. This evidence was ruled out, and properly so. Gibney was connected with another division of the plaintiff's road. Moreover, no preliminary proof was made to the effect that a train dispatcher or a station telegraph operator had any authority in the premises. Even if this were not so, there is no evidence in the record tending to prove that any one connected with the operation of the road, and in authority, had knowledge that work was being done at the time at the bridge in question. And the work being done was not such as to interrupt or interfere with the ordinary operation of trains over the road.

II. The other matters of negligence alleged may be disposed of in brief. We need not stop to consider what might have been the effect of the situation had Carpenter

2. NEGLIGENCE:
warning;
proximate
cause.

been unconscious of the approach of the train. The fact is that he was advised of the danger about as soon as the enginemen could have discovered him. Now, manifestly, negligence cannot be predicated upon a failure of duty to warn when the person to be warned is fully alive to and presently advised of the impending danger, and this practically as soon as the warning could have been given. Nor can it be said that in such a case the failure of duty — conceding that the duty existed — was the proximate cause of the accident; and this, if for no other reason, because under the circumstances shown the accident would have occurred irrespective of any warning that might have been given. What we have said applies to the failure to

sound the whistle for the highway crossing, and with even more force, as it appears that in respect thereof the duty did not arise until the train was within about one hundred feet from the place occupied by Carpenter on the track. In our view, the facts bring the case within the principle which governs in cases of accidents upon highway crossings. If the traveler see or hear the train approaching, or is otherwise warned as thoroughly as he would have been had the whistle been sounded or the bell rung, he cannot bottom a charge of negligence on a failure to sound an alarm, as such cannot be said to be the proximate cause of the accident. *Willoughby v. Railway*, 37 Iowa, 432; 2 Thompson on Negligence, section 1558.

The verdict was rightly directed, and the judgment is *affirmed*.

THE CITY OF WAVERLY, Appellee, v. BREMER COUNTY,
Appellant.

Mulct tax: COLLECTION: COMPENSATION OF COUNTY TREASURER. That portion of the regular annual mulct tax which a county is required by law to pay to a city, is not subject to the county treasurer's charge of three fourths of one per cent. for collection, as provided in Code, section 490, but any additional tax imposed by the city for its benefit and collected by the treasurer should pay this commission.

Appeal from Bremer District Court.—HON. CLIFFORD P.
SMITH, Judge.

WEDNESDAY, DECEMBER 14, 1904.

THE opinion states the case.—*Affirmed*.

O. H. Mitchell, for appellant.

L. L. Thompson, for appellee.

WEAVER, J.— The city of Waverly brought this action at law to recover from the defendant a sum of money alleged to have been collected by the county treasurer as mullet taxes for the city's use. The county, by its answer, admitted the collection of the money described, but justified the refusal to pay it over on the ground that the sum was rightfully retained as fees of the treasurer for his services in making the collection. The material facts may be stated as follows: During the years 1894 to 1902 the county collected the regular annual mullet tax or charge of \$600 per year, assessed, as provided by the statute, upon several tracts of real estate in the city of Waverly which were occupied and used as places for the keeping and selling of intoxicating liquors. During the same year the city of Waverly, as authorized by the statute, assessed an additional amount of mullet charges or taxes upon the same property, which assessments were certified to the county treasurer, by whom they were collected for the city's benefit. Of the moneys collected as aforesaid one-half of the regular annual charge of \$600 and all the special or additional charge levied by the city has been paid over to the city, except a balance equal to the three-fourths of one per cent. on the collections thus made. On the foregoing conceded facts the trial court found that the city was liable to pay the collection fee upon the special or additional charge or tax levied and collected solely for its own use and benefit, but held that as to the collection of the general or regular statutory charge the treasurer could not rightfully retain any fee or commission for his services. As the county alone appeals, we have no occasion to review the finding of the district court except as to the general or regular annual mullet of \$600.

The statutory provisions to which our attention has been called are as follows: Code, section 490: " Each county treasurer shall receive for his services the following compensation: (1) Three-fourths of one per cent. of all money collected by him as taxes due any city or town, to be paid out

of the same." Code, section 2445: "The revenue derived from the (mulet) tax provided for in this chapter shall be paid into the county treasury, one-half to go into the general county fund and the remainder to be paid over to the municipality in which the business taxed is conducted." The first-cited section is in the chapter relating to the duties and compensation of the county treasurer, and has been the law of the State for many years. The other clause is found in the chapter relating to the sales of intoxicating liquors, and was enacted within a comparatively recent period. The propriety of the original provision as applied to ordinary municipal taxes is apparent. Such taxes are levied by the local authorities of the city or town for its own local purposes. The county at large has no interest in them, and derives no benefit from them, and therefore, when a county officer, elected and paid by the county at large, is called upon to collect these local taxes for local purposes, the municipality which receives the benefit of his services should pay a reasonable compensation for the time and labor required at his hands. At the very least, it is within the discretion of the Legislature to require such compensation. The collection of the special or additional mullet, which is left solely to the discretion of the municipality, and is levied solely for its own use and benefit, comes within the suggested reason which underlies Code, section 490. But this cannot be said of the regular annual mullet. That charge is levied and is payable independent of any initiative or option on part of the city, except as the consent of the city is necessary to the operation of the so-called "bar clause" of the statute. It is not collected as a city tax, but as a general charge or penalty on account of the business to which the property is devoted, and the whole sum is due and payable to the county. When collected, the statute (Code, section 2445) makes provision for its disposition by direction that one-half be placed in the general county fund, and the remainder (which is the entire undiminished one-half) be paid over to the municipality in

which the business is conducted. If there be any incongruity or inconsistency between the two sections of the statute which we have been considering, then we think the trial court was right in holding that the general direction in section 490 must yield to the special direction found in section 2445. In our judgment, the general mulct charge is not a municipal tax, and the mere fact that the statute provides that, when collected, one-half shall be turned over to the city, gives the treasurer no right to retain the commission provided for in section 490.

The judgment of the district court is *affirmed*.

THE CITIZENS' BANK OF DES MOINES, IOWA, Appellee, v.
THE CITY OF SPENCER, Appellant.

Cities: SEWERAGE: UNAUTHORIZED ACTS OF COUNCIL. In the absence
1 of a valid ordinance or resolution directing the construction of
sewerage, a city council can not make a valid municipal obligation
with respect thereto.

Sewerage: UNAUTHORIZED CONTRACT: ESTOPPEL: QUANTUM MERUIT.
2 One dealing with a municipal corporation is bound to take notice
of the statutory limitations upon its power, and the unauthorized
act of a city council in contracting for sewerage will not estop the
city from denying liability therefor, notwithstanding the implied
representations of authority so to do; nor is a *quantum meruit*
recovery in such cases authorized.

Limitation of indebtedness: PAYMENT FOR SEWERAGE. The agreement
3 of a city to pay the costs of sewerage from its own funds, where
such action would raise the city's indebtedness beyond the con-
stitutional limit, is invalid.

Implied contract: LIMITATION OF ACTION. An action against a city
4 on an implied contract to pay the cost of sewerage must be brought
within five years from the date at which the cause of action
accrued, in the absence of such facts as operate to toll the statute.

Sewerage: REASSESSMENT OF COST. After a sewerage assessment has
5 been declared invalid and a legislative act intended to cure the
assessment has been passed, the city should be given an opportunity
to make a reassessment before suit is brought against it on an
implied contract to pay for the sewerage.

Appeal from Clay District Court.—HON. A. D. BAILEE,
Judge.

WEDNESDAY, DECEMBER 14, 1904.

ACTION at law to recover the amount of certain assessment certificates for a sewer constructed in the defendant city on the theory that these assessment certificates were declared invalid, and the city is liable to the contractor doing the work, or to his assignee, for the amount thereof. Several defenses were interposed by the city, to some of which we shall refer during the course of the opinion. The trial court rendered judgment for the plaintiff, and the defendant appeals.—*Reversed.*

Buck & Kirkpatrick, for appellant.

G. H. Martin, for appellee.

DEEMER, C. J.—On October 22, 1892, the city council of the defendant city undertook to pass an ordinance for the construction of sewers and to assess the cost thereof against abutting property. Pursuant thereto a contract was entered into with one Likes for the construction of the sewer. January 20, 1893, the city council accepted the work, and assessed the cost thereof against abutting and adjoining property, and caused assessment certificates to be delivered to the contractor pursuant to its contract with him to the effect that he should receive the same in full payment for his work in front of the various properties. The owners did not indorse any waivers on the back of these certificates, nor were any payments made by them. These assessments were certified to the county treasurer for collection in December of the year 1893, but payment was refused, and the lots against which the assessments were levied were advertised for sale. An action was then brought by the then owner of certain lots against the county treasurer to restrain these sales. That

case finally reached this court, and the assessments were held illegal. See *Griffin v. Messenger*, 114 Iowa, 99. Plaintiff herein, as assignee of the contractor, intervened in that action, and was a party thereto. The parties to that action, and all concerned in the result thereof, acted in entire good faith, and believed that the ordinance passed by the city council was valid and binding, until the adverse decision of this court. In December, 1901, plaintiff, as assignee of the contractor, presented a claim to the city council for the amount of the certificates and for the costs in the case above referred to. This claim was refused, and plaintiff thereupon commenced this action. The defendant was not made a party to the Griffin suit, nor was it at any time notified of the default of the owner of the property in paying his assessments until plaintiff's claim was filed with it. Neither has there been any demand for a reassessment of the property, or for any further action on the part of the city, except to pay the plaintiff's claim. At the time the sewer was constructed, defendant was indebted up to the constitutional limit. The *Griffin Case* was decided in this court in May of the year 1901. In that case it was held that the entire proceedings were void, for the reason that the ordinance for the sewerage of the city had not been legally adopted. After the decision of that case the General Assembly passed a curative act known as chapter 224, page 179, Acts Twenty-ninth General Assembly, which undertook to cure retroactively all ordinances, resolutions, etc., at any time passed as this one was.

Plaintiff contends that the city is absolutely liable in this case under the rule announced in *Light Co. v. Ft. Dodge*, 115 Iowa, 568, and other like cases; while defendant claims that that case has no application; that under the curative act all proceedings were validated, and plaintiff should now enforce its assessment certificates; that the plaintiff and his assignor were charged with notice of the powers of the city council, and are conclusively bound to know that all the proceedings were irregular and void; that in such cases as this

the city is not liable, because the assessment certificates were invalid, and the invalidity goes to the power of the city to act at all; that the city was indebted up to its constitutional limit, and cannot be held on an express contract to pay, and that, if sought to be held on an implied contract, the cause of action is barred. It also insists that plaintiff is barred by laches; that it is not entitled to recover, because it made no demand for a reassessment, and gave no notice to the city so that the city might have made a reassessment as by statute provided. These are the principal points argued, and, as they are each and all presented by the pleadings, we shall consider such of them as are deemed important and controlling.

As the case may be disposed of without more than incidental reference to the curative act, we shall not consider the exact effect of that act upon the Griffin-Messenger Case,

1. SEWERAGE:
unauthorized
acts of
council.

save to say that it is extremely doubtful if the Legislature had power to in any manner affect Griffin's rights in and to the property after a decision of this court establishing the same. The record here presents quite a different state of facts from what appears in the Ft. Dodge and other like cases. There a valid contract was made with the contractor, whereby the city undertook and impliedly guarantied to levy valid assessments against abutting property to pay for the work. Here the defect lies deeper. The city did not pass a valid ordinance or resolution for the doing of the work, because a sufficient number of the councilmen did not vote in favor thereof, or did not vote for a suspension of the rules, which we shall treat for the purposes of the case as the same thing. Without a valid ordinance or resolution the city council had no power to order any sewerage. If it undertook to do so, its act was not binding upon the municipality or any one else. There was an express statutory limitation on the power of these officials, and of this all persons dealing with them must take notice. *Harrison v. Palo Alto County*, 104 Iowa, 389;

Estep v. County of Keokuk, 18 Iowa, 199; *Clark v. City of Des Moines*, 19 Iowa, 199; *Mechem on Public Officers*, sections 506, 511, 512, and cases cited; *McPherson v. Foster*, 43 Iowa, 58. This is fundamental doctrine, announced with practical unanimity by all courts. The application of it to this case is clear, and this points to the distinction between cases where the contract between the city and the contractor is a nullity, and cases where the contract is good, but the city fails or neglects to take some steps under the contract itself, which it has expressly or impliedly undertaken to do. In the one case the contract is perfectly good, and the contractor has nothing to do with the making of the assessments. In the other the original contract with the contractor is invalid because of a statutory limitation upon the power of the officials making it. In the latter instance the contractor is bound to know of the authority of the city officials, and in the other he is not, but may rely upon the council's taking the necessary steps in fulfillment of its obligation.

The city council, in making a contract for the city, cannot estop it by acting beyond the limit of its powers. The law provides just how such matters may be done, and of this every one is conclusively presumed to have notice. When acting without authority or beyond its powers, the city council cannot estop the city, for, no matter what its representations, a party dealing with it is bound to take notice of all statutory limitations upon its authority. There can be no recovery even upon *quantum meruit* in such cases, especially where, as here, the city did not obligate itself to pay for the improvement, and was undertaking to do but a small part of it for its own benefit. Any other rule might completely ruin any city, for the Legislature could not, if the converse were true, limit the powers of a city council. *Cedar Rapids v. City*, 118 Iowa, 254. When making any sort of a contract, the city officials impliedly represent that they have authority to do so, but such representations are not binding

2. SEWERAGE:
unauthorized
contract;
estoppel;
quantum
meruit.

upon the city, for the reason that the powers of these officials are limited, and we are bound to look to the law for their authority and the validity of their acts. These views are well sustained by authority. See *Boston Co. v. City of Cambridge*, 163 Mass. 64 (39 N. E. Rep. 787); *Schumm v. Seymour*, 24 N. J. Eq. 143; *McDonald v. City*, 68 N. Y. 23 (23 Am. Rep. 144); *Moylan v. City*, 32 La. Ann. 673; *Hitchcock v. City*, 96 U. S. 341 (24 L. Ed. 659); *In re Market Street*, 49 Cal. 546; *Daly v. City*, 72 Cal. 154 (13 Pac. Rep. 321); *Trustees v. Hohn*, 82 Ky. 1; *City v. Wann*, 144 Ind. 175 (42 N. E. Rep. 901, 31 L. R. A. 743); *Brady v. City*, 20 N. Y. 312; *Town v. Peacock*, 89 Ky. 495 (12 S. W. Rep. 1042, 25 Am. St. Rep. 552).

II. Aside from this, the city did not make an express contract to pay the contractor from its own funds. If it did, the contract was void, because beyond the limit of indebtedness prescribed by the Constitution. In some of the cases relied upon by plaintiff there are chance expressions to the effect that the city is liable in such cases as upon a guaranty or contract; but these must be taken in connection with the facts and the issues involved. The cities were held liable in each of these cases on the theory of an implied obligation or contract to make legal assessments. If the obligation had been an express one to pay the amount of the assessments, or the contract price for the work, it is manifest that the contracts would have been held illegal in some of the cases because creating a debt beyond the constitutional limit. *Allen v. Davenport*, 107 Iowa, 90, and see cases cited in *Ft. Dodge Case*, supra. So that it cannot be assumed that the city is to be held liable on an express contract in order to avoid the statute of limitations, for this would be flying from Scylla to Charybdis. Manifestly, there was no written contract here to pay plaintiff or its assignor the contract price, or the amount of the assessment certificates. There was no fault on the part of the city in levying these assessments, save that

3. LIMITATION
OF INDEBTED-
NESS:
payment for
sewerage.

the council had no authority to order the work done in the manner it did. In all that it did after letting the contract no fault can be found. We come, then, to the next proposition — that the action is barred by the statute of limitations.

III. Actions on implied contracts must be brought within five years after the causes of action accrue. This must be an action upon an implied contract, or for a wrong committed by the city; and in either event the action must be brought within the time limited. The cause of action, if any there be, accrued not later than the time when plaintiff's assignor completed the work. No mistake or fraud is pleaded in order to remove or toll the statute, and the action is not founded on either. Hence we think it was barred within five years from the time plaintiff's assignor might have brought his action, which was not later than January 20, 1893. This suit was commenced February 3, 1903; hence it is clearly barred. The pendency of the Griffin suit is not pleaded as tolling the statute, and for this reason that point is not in the case.

IV. Moreover, we think the city should have been given an opportunity to reassess after the curative act was passed, or at some place along the line. It lost that right because not notified, so far as this record shows, of any trouble in the assessment. Perhaps the county treasurer may be said to have represented the city, and that notice to him was sufficient; but this is not claimed or relied upon, and we make no pronouncement thereon. As sustaining these conclusions, see Code, sections 649, 650, 3447, and *Smith v. Cramer*, 39 Iowa, 413. Taking the entire case, and we think it fails to show any liability on the part of the city, and the judgment cannot be sustained. As further sustaining these conclusions, see *Ryce v. Osage*, 88 Iowa, 558; *Agawan v. South Hadley*, 128 Mass. 503.— *Reversed*.

4. IMPLIED
CONTRACT:
limitation of
action.

5. SEWERAGE:
reassessment
of cost.

J. J. FERGUSON, Appellant, v. POTTAWATTAMIE COUNTY,
Appellee.

Superior courts: REPORTER: COMPENSATION. The shorthand reporter of a superior court is entitled to compensation for all of the time he is required to attend court, in the same manner as reporters of the district courts, and his compensation is not restricted to the time he is actually engaged in taking evidence.

Appeal from Pottawattamie District Court.—HON. W. R.
GREEN, Judge.

WEDNESDAY, DECEMBER 14, 1904.

SUIT to recover for services as a shorthand reporter. There was a judgment for the defendant. The plaintiff appeals.—*Reversed.*

Harl & Tinley, for appellant.

W. H. Kilpack, for appellee.

SHERWIN, J.—The plaintiff was the official shorthand reporter of the superior court of Council Bluffs for the term of four years, and during that time, and by order of the judge thereof, he was in actual attendance upon said court during its sessions 298 full days, and was actually engaged in writing shorthand 189 days of this time. The county paid him for the time he was actually engaged in writing shorthand, but refused to pay him for the rest of the time. There is no disagreement as to the facts, and the sole question for our determination is one of statutory construction.

Section 275 of the Code of 1897 provides that "the judge of each superior court may appoint a shorthand reporter. All provisions relating to shorthand reporters and

their duties in the district court, in so far as applicable in every respect, shall govern, except the compensation shall not exceed five dollars a day for the time actually employed." The trial court construed this section to mean that the reporter thus appointed should receive compensation only for the time actually employed in writing shorthand. Section 181 of the Code of 1873 authorized the district or circuit court to appoint a shorthand reporter for the purpose of recording the oral testimony of witnesses in criminal cases, and in civil cases at the request of either party, "and such other matter as the judge may direct." The compensation of the reporter appointed under this statute was fixed by section 3777 thereof, and was not to exceed \$8 per day for "each day actually employed in court in taking testimony." This statute was clear and explicit, and by its terms limited the reporter's compensation to the time actually engaged in taking testimony. The Eighteenth General Assembly amended the statute relating to reporters, and provided in chapter 195, section 1, for the appointment thereof, and in section 2 of said chapter the reporter's compensation was fixed "for all time actually in attendance under the order of the judge." Under the provisions of Code 1897, section 254, the reporter was entitled to \$6 per day for each day's attendance upon the district court under the direction of the judge, and his duties were detailed by section 3675 thereof; and it is apparent that the duties prescribed by the latter section required the attendance of the reporter practically all of the time that the court was in session, or at least all of the time that appealable actions were being tried; and consequently the Legislature wisely provided for compensation for each day's attendance, whether actually employed in writing shorthand or not. Had it done otherwise, the business of the courts would have been very materially delayed, and the court expenses correspondingly increased.

By the terms of section 260 of the Code, superior courts

are given concurrent jurisdiction with the district court, in all civil matters, except in probate matters, and in actions for divorce, alimony, and separate maintenance. This may properly be considered in arriving at the intent of the Legislature in providing reporters for said court. Under section 275, shorthand reporters in the superior court are required to be in attendance upon the court, and to perform the same duties that are imposed upon such reporters in the district court. They are appointed by the judge of the superior court, and are clearly and unmistakably under his direction and control, and may be required to attend the sessions of the court whenever the judge shall deem their presence necessary for the reasonable dispatch of business. Were the statute under consideration to be construed as strictly and as narrowly as the appellant claims it should be, the reporter would be compelled to count the hours and fractions thereof during which he was actually engaged in writing shorthand. We do not believe that the word "employed," as used by the Legislature, was intended to restrict the reporter's compensation to the time actually engaged in reporting the testimony or the proceedings. All lawyers, judges, and legislators know that courts must necessarily devote some time to matters other than the trial of cases, and that they cannot always foresee just when a reporter's services may be required; and for this very reason the reporter is placed under the control and direction of the court, and may be required to attend upon the order of the judge. We think the attendance thus required is the employment contemplated by the statute. To hold otherwise would be to declare that a reporter may be required to attend upon the court days, weeks, and months, without compensation. That the Legislature did not intend such a result, or to so discriminate between reporters of the district and superior courts, is very clear to us.

The judgment is therefore *reversed*.

GEORGE N. FERGUSON v. O. D. WHEELER, District Judge.

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| 126 | 111 |
| 1144 | 302 |

Punishment for contempt: JURISDICTION. The district court of Pottawattamie county sitting at Council Bluffs has jurisdiction to enter an order of punishment for contempt in a case pending in the same court at Avoca, in said county, where the parties stipulate that the contempt proceedings shall be heard at that time and place.

Contempt: PROCEDURE: JUDICIAL NOTICE. An application to punish for contempt may properly be made in a pending case, rather than by an independent proceeding in the name of the State; and the court will take notice of the records of prior proceedings in the case without their introduction in evidence.

Certiorari to Pottawattamie County District Court.

WEDNESDAY, DECEMBER 14, 1904.

THIS is an action instituted in this court to determine the legality of an order that the plaintiff pay a fine of \$25, and be imprisoned in jail for a period of one day, unless he shall sooner return certain personal property to the owner in accordance with the previous order of said court, and pay costs of the proceeding.— *Dismissed.*

Fremont Benjamin, for plaintiff.

George Bruington, for defendant.

MCCLAINE, J.— In an action in equity instituted in the district court of Pottawattamie county, at Avoca, by James Corse against George N. Ferguson, the plaintiff in this proceeding, an application was made to have Ferguson required to appear for examination under oath as to whether he had taken from certain real estate personal property which formed a part of the same, and appropriated it to his own use, said real estate having previously been found by decree

in the case to belong to plaintiff. In response to this application, it was ordered that Ferguson within ten days return to said premises the personal property described in the application, and that he be held to answer for contempt. Subsequently further application was made in the same case to enforce the decree as to certain portions of the personal property which it was alleged Ferguson had failed to return in accordance with the court's order, whereupon Ferguson filed his answer to such application, and the parties to the proceeding entered into a stipulation that the case be continued, and that the contempt proceedings "shall come before his honor Judge Wheeler, at Council Bluffs, Iowa, on the first day of March term of court, which convenes at Council Bluffs, Iowa, on March 25, 1902." The previous proceedings had been in the district court of Pottawattamie county, held at Avoca, Hon. N. W. Macy, district judge, presiding. By statute (Code, section 228) the district court of Pottawattamie county holds terms at Avoca as well as at Council Bluffs, the county seat. The case was not put on the docket of the court for hearing at Council Bluffs, but on the date named in the stipulation Judge Wheeler, holding the district court at Council Bluffs, proceeded to try the issue raised by the application and the answer thereto — both the parties appearing by their attorneys — and, after the introduction of the evidence, Ferguson having filed written objections in which he protested his inability to further comply with the order of the court as to the return of the property and challenged the right of the court to further proceed in the premises, an order was made finding that Ferguson had not returned certain portions of the property, and had disposed of the same contrary to the previous order in the equity proceedings and otherwise violated the court's orders, and that he be imprisoned in the county jail and pay a fine, as already stated.

The facts above set out are made to appear by return to the writ of *certiorari* sued out in this court, and the ques-

tions presented to us by the petition for the writ, are, first, whether Judge Wheeler had jurisdiction, holding the district court at Council Bluffs, to enter an order of punishment for contempt in the equity case pending in the same court at Avoca; and, second, whether the judge could on such hearing consider the record of the proceedings in the case at Avoca without such records having been introduced in evidence on the hearing at Council Bluffs.

I. Counsel for plaintiff argues this case on the theory that Judge Wheeler, in the proceedings at Council Bluffs,

1. PUNISHMENT FOR CONTEMPT: jurisdiction. was acting as district judge in vacation, and not as district judge holding the district court, and that the order made by him for the punishment of Ferguson for contempt was not effective until entered on the record of the district court at Avoca. But there is no merit in these claims. The district court for Pottawattamie county is the same court, presided over by the same judges, whether held at Avoca or at Council Bluffs; and, when the parties stipulated in the contempt proceedings pending in the court at Avoca that a hearing thereof should be had before Judge Wheeler at the term of the same court to be held at Council Bluffs, the hearing was properly had before the court, and not before Judge Wheeler in vacation, and the order made was the order of the district court, and not the order of Judge Wheeler. We cannot see how there can be any question as to the jurisdiction of the district court to proceed in the case at Council Bluffs after a stipulation had been made by the parties that the court should thus proceed. This is not a case in which the question arises whether jurisdiction can be conferred by consent. The court already had jurisdiction, and the stipulation related merely to the term of court at which the trial should be held. The parties were already in court, and appeared on the hearing, and each introduced his evidence. There was therefore no want of

jurisdiction, or irregularity of proceeding which would justify us in annulling the order made.

II. The application for an order to punish for contempt was made in the equity case already pending, and was properly made in that action, and not as an independent

action commenced in the name of the State.
 2. CONTEMPT: procedure; judicial notice. *Manderscheid v. District Court of Plymouth County*, 69 Iowa, 240.

In this auxiliary proceeding the court properly took notice of the records of the prior proceeding in the case, and it was quite unnecessary to introduce such records in evidence. *Jorden v. Circuit Court of Wapello County*, 69 Iowa, 177.

We reach the conclusion, therefore, that Judge Wheeler, holding a term of the district court of Pottawattamie county, did not, in entering the order of punishment for contempt, exceed his proper jurisdiction or otherwise act illegally. Plaintiff's action is therefore *dismissed*.

CHARLES TOMER v. E. R. AIKEN, and A. W. TROUT,
 Appellants.

Physicians: NEGLIGENCE: DIAGNOSIS. In an action for damages re-

1 sulting from an alleged negligent treatment of an injury to plaintiff's shoulder bones, the question of whether the injury was diagnosed as a dislocation or as a fracture, was, under the conflicting evidence, one for the jury.

Negligent treatment: DIAGNOSIS. The fact that a physician improp-

2 erly diagnosed an injury as a fracture rather than as a dislocation was immaterial on the question of negligent treatment, where the treatment was suitable to reduce a dislocation.

Negligence: EVIDENCE. Negligence of a physician cannot be predi-

3 cated on a failure to effect a cure of a dislocated shoulder bone, where it is shown that favorable results are not always obtained under any form of treatment.

Same. Negligence in permitting certain intervals to elapse between

4 a physician's visits depends on the custom or practice in similar

localities, and not on the custom of a particular physician in his own practice.

Improper treatment: EVIDENCE. Where the employment of a physician has been terminated, he may refuse further attendance, and such refusal, where there is no further showing save the patient was suffering the pain usual in such cases, will not justify the admission of evidence that the same amounted to improper treatment; nor under the circumstances was negligence of the attending physician shown.

Improper treatment: EXPERT EVIDENCE. In an action for the negligent treatment of a dislocated shoulder, the evidence is reviewed, and in view of the conflict, is held to present a question for the jury as to whether the method of treatment adopted was proper.

Appeal from Dallas District Court.—HON. J. H. APPLE-GATE, Judge.

THURSDAY, DECEMBER 15, 1904.

ACTION for damages alleged to have resulted from the negligent treatment of the dislocation of the clavicle. The verdict was for the plaintiff, and from judgment thereon defendants appeal.—*Reversed.*

Edmund Nichols and Shortley & Harpel, for appellants.

Cardell & Fahey, for appellee.

LADD, J.—Only two errors are argued, but these involve the twelve points raised in appellants' belief. The one challenges the propriety of a hypothetical question, and the other the sufficiency of the evidence to support the verdict. On the 26th day of June, 1902, the plaintiff undertook to repair the tin roof on his house. When descending from the porch, he placed one foot on a stepladder about five feet high, which slipped, and he fell to the ground. The outer end of the collar bone, or clavicle, was dislocated from the shoulder blade, or scapula, or, technically speaking, the dislocation was of the clavicle

1. NEGLIGENCE:
diagnosis.

from the acromion process. Dr. Aiken was called, but refused to treat the patient unless another physician were present. The family explained that they had been unable to get any one else, and the physician then sent for Dr. Trout to assist him. Upon his arrival, Tomer was examined, and, according to four witnesses, the physicians announced that the collar bone had been fractured or broken. Two of these were uncertain of the language used, while the physicians testified they concluded that it was a dislocation only, and Dr. Aiken that he had explained to Tomer that the collar bone was broken away from the scapula; and in this he is confirmed by another witness. While the physician, in trying to explain the injury so as to be within the comprehension of those not familiar with medical terms, may have been misunderstood, yet the evidence was such as to leave the question as to whether the case was properly diagnosed an open one for the jury's determination.

If it be conceded, however, that the physicians declared it a case of fracture of the clavicle, rather than dislocation, they are not liable, unless improper treatment followed. No one claimed on the trial that the clavicle had been fractured, nor was there any evidence that the dressing applied was adapted peculiarly to remedying that defect. If suitable at all, it was as appropriate to the reduction of a dislocation. In these circumstances there was no occasion to submit the issue raised in the first count of the petition that, because of a mistake in the diagnosis, the plaintiff had been treated for a fracture, rather than a dislocation, to the jury. If the treatment was such as reasonable skill and care exacted for the cure of a dislocated clavicle, defendants were not liable, regardless of what their diagnosis may have been; otherwise they were.

II. Was the dressing such as should have been used in reducing the dislocation and securing rearticulation? Ordinarily, little difficulty is experienced in reducing the dislocation. The trouble is to retain the bones in a position so

2. NEGLIGENT
TREATMENT:
diagnosis.

that articulation will be effected. The narrow extremity of the articulating surface, the movability of the shoulder, the contraction of the muscles, and the possibility of ligaments falling between, render the result somewhat experimental. In applying the dressing difficulty is experienced in securing a purchase which will hold the bones on the same level. Dr. Ross, upon whose testimony as an expert plaintiff relied, freely admitted that "there is no assurance under any form of treatment that the bone is going to stay there," and testified farther that "the results are not always satisfactory under any form of treatment, but the majority of them get well. Complete is more difficult than incomplete dislocation, but are sometimes successful. The majority are successful under modern methods." In this view all the physicians concurred. Failure to effect a cure under such circumstances furnishes no evidence of want of care or skill. The patient suffered considerable pain, but this, as the evidence shows, may have been incident to the character of the injury.

The accident occurred on Wednesday, and Dr. Aiken did not call again until the Sunday following, and not again until a week from that day. If the injury required no attention during the intervals, he was not chargeable for neglect, if any there was; and in determining whether he was negligent Dr. Ross's custom in his own practice cannot be accepted as the criterion. That must necessarily depend upon the custom or practice in similar localities in the treatment of such injuries. But if Aiken was negligent in not attending his patient as frequently as he should, this was no fault of Trout. He had nothing to do with the case after the first dressing was applied, and was in no way responsible for anything that happened thereafter, unless resulting from some defect therein; and the jury should have been so instructed.

III. The dressing was put on at about 3 o'clock in the afternoon, and in the evening plaintiff's attendant tried to

3. NEGLIGENCE:
evidence.

4. SAME.

reach Aiken, but could not do so, by telephone. She then telephoned for Dr. Trout, who responded that he could not come, and, upon a second inquiry, that he was in bed, and could not come. Without other showing save that Tomer was suffering much pain, which is usual in such cases, Dr. Ross was asked, in substance, whether, under the circumstances disclosed, it would be proper treatment for a doctor to refuse to attend a patient. There was no claim that any relapse or evil consequences resulted. Another physician in fact called and thinned the wad under the arm. The employment of Trout had terminated at the completion of the dressing. He had the perfect right to refuse to be employed farther, especially while the attending physician was still in charge of the case. Moreover, he was not advised that Aiken, who was at home, but temporarily without telephone connection, could not be found. As the case stood then, Aiken knew nothing of plaintiff's wish that he call, and did not learn of it until Sunday, the day he had set for his next visit; and Trout was not in plaintiff's employment, and was under no legal obligation to attend him. Manifestly, then, the objection to the question should have been sustained. That the answer, consisting of a somewhat extended discourse on medical ethics, was prejudicial, we entertain no doubt.

IV. If defendants were negligent, it was in the method of dressing adopted. This was described by Dr. Aiken as follows:

The end of the bone had been forced through the capsule. There was only the thin skin over the end of the bone; skin was almost broken through, and bleeding; had started through the skin. We examined it carefully, and the end of the bone seemed sharp. That was our first impression, but we made up our minds it was simply the cartilage pressing there. We reduced it. We prepared adhesive plasters, bandages, and compresses; elevated the shoulder upwards and outwards; reduced the dislocation; put a small firm compress over the

5. IMPROPER
TREATMENT:
evidence.

6. IMPROPER
TREATMENT:
expert
evidence.

clavicle, just as near as we could to the injured skin; then took a wide strip of adhesive plaster, put it down across his chest, brought it over this pad, carried it to one side of the wound in the skin, brought the pressure on there to keep the clavicle down, then fastened it clear down his back. Then we put on five or six of those long strips, keeping the shoulder up and out during the time, put a roll of cotton under the armpit against the chest wall, keeping the arm up and carrying the shoulder outwards, and then we put a bandage around his body to hold his arm in that position; and put a broad sling under the elbow to keep the elbow up, hanging it across on the other side.

The testimony of Dr. Trout was substantially the same, and neither differed essentially from the description of plaintiff and Mrs. Childs. That was all the evidence that tended to show what the treatment was. Both physicians testified that the reduction was perfect. No change, save to move the roll under the arm a little, was made by Aiken when he called the first Sunday; but on the second Sunday, upon finding the plasters softening, and the skin irritated, he removed the bandages, and put a figure 8 bandage on instead. He testified: "The bone was not riding the scapula. It was down almost in place. I saw that, if I allowed the shoulder to drop, it would come out; but it did not come out, and when I brought the shoulders back it seemed to be smooth. The clavicle had been kept in position up to that time; had not rode any." And there was nothing in the record to throw any doubt on the truthfulness of these statements, save the testimony of plaintiff that there was then a small bunch on the shoulder, and the recognition by other physicians that, if this were true, there could not have been a perfect reduction. But for this evidence there would be much force in appellant's contention that the record failed to indicate that the treatment, regardless of its character, was not efficient. The fact that when Dr. Ross examined him the outer end of the clavicle was dislocated did not indicate that it had not been properly reduced, for, as he said, "if

the bandages are removed in ten days, they might as well never have been applied." Whatever the treatment, the articulation would not be sufficient in that time to hold the bones in place. And this seems to have been the consensus of the expert opinion. At the time of the trial the bone was an inch inward and backward from its bed, and had traveled one-half to three-fourths of an inch since Ross first examined it. But this would have followed plaintiff's abandonment of all treatment, regardless of its character. The next morning, on his own motion, plaintiff cut the figure 8 bandage from his person, owing, as he claimed, to the pain that he was suffering, and received no treatment thereafter.

The contention of plaintiff was that, while the dressing applied might have been such as had formerly been used, yet it was in fact inefficient, and that the Stimson method of dressing, discovered in 1883, should have been adopted. It was thus described by Dr. Ross: "The proper treatment of simple complete upward dislocation, as this is, of the collar bone, is first to reduce the dislocation. There are several different treatments, however, that might be accounted standard. Put the arm in proper position, and take a piece of adhesive plaster about a yard long, which sticks to the skin, and adjust over the shoulder and down under the elbow, so that it holds the arm up, and takes the dragging off the collar bone. Then put a bandage around to prevent his swinging his arm forward and dislocating it." He expressed the opinion that the method adopted originally and in the use of the figure 8 bandage had been standard until Stimson's treatment came in vogue, but were not now regarded as efficient, and that he had not noticed these treatments mentioned in the more recent works. In response to Trout's statement that Stimson's method would have been improper because of the clavicle being about to protrude through the skin, he admitted that the Stimson's method in exact words required the bandages to be brought over the point of the clavicle, but explained that he would have placed them at either side.

On the other hand, four physicians, besides the defendants, gave it as their opinion that it was wholly immaterial what method was adopted if the dressing was so placed as to retain the bones in a position by holding the shoulder up, out, and back, and that the methods adopted were generally approved. The value of expert opinion cannot be determined by counting noses, and, even though six physicians took one view and but one the other, the issue was for the jury to decide.—*Reversed.*

OAKLAND CEMETERY ASSOCIATION OF LYONS, IOWA, Appellee, v. J. L. LAKINS, and ANNIE LAKINS, Appellants.

Bills and Notes: DISCHARGE: PAROL EVIDENCE. Where a note was 1 executed in consideration of other prior agreements between the parties, parol evidence is admissible in an action on the note, to show the entire agreement and that it has been performed.

Conditional delivery: PAROL EVIDENCE. Where a note is delivered 2 as security for a prior parol agreement, its conditional delivery may be shown by parol.

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| 140 | 749 |

Appeal from Cerro Gordo District Court.—HON. C. H. KELLEY, Judge.

THURSDAY, DECEMBER 15, 1904.

ACTION to recover interest on a promissory note for the sum of \$700 made by the defendants to one Boyd, and by Boyd's administrator (Boyd being dead) indorsed to plaintiff. Defendants filed an answer in two divisions, to which plaintiff filed a demurrer, which was sustained; and, defendants electing to stand on their answer, judgment was rendered against them for the amount of the interest claimed, and they appeal.—*Reversed.*

Glass, McConlogue & Witwer, for appellants.

Earl Smith, for appellee.

DEEMER, C. J.—As the sufficiency of the answer is alone involved, we here state the substance thereof: Defendants admit their signatures to the note, but deny the delivery thereof to the payee. They aver: That T. G. Boyd, the payee of the note, conveyed to them two lots in the town of Bockwell pursuant to an agreement, which was partly in writing and partly in print, whereby the defendants, in consideration of the conveyance, promised to pay said Boyd during his lifetime interest at the rate of six per cent. per annum upon \$700. That, after this agreement and conveyance had been made, Boyd requested defendants to deposit with him some instrument in writing, in the form of a note or otherwise, to be held as evidence of their obligation to pay the interest, and as security for the payment thereof; the said instrument to have no other effect beyond its efficacy as evidence of and as security for the defendants' obligation to pay interest as aforesaid; the said note to remain in Boyd's possession until his death, and then to be surrendered to defendants. That, after making this agreement, Boyd wrote the defendants as follows: "As I said before, all I want is the interest of \$700.00. I enclose a note for that amount. If it is satisfactory please sign the note, together with Mrs. Lakins, and send it to me and I will send the deed. I am unusually well and will be up some time for a good visit. Don't know whether I will go East. Yours truly, F. G. Boyd." Defendants allege that the note was never delivered to Boyd as such, or as his property, and that it was simply to be held by him during his lifetime as evidence of and as security for defendants' obligation to pay interest, and that upon Boyd's death defendants became entitled to the possession of the note. They further alleged that they paid all interest down to the time of Boyd's death, and that plaintiff herein had full knowledge and notice of the agreement between the original parties at the time it ac-

quired the note. The second division of the answer is largely a repetition of the first, except that it pleaded that there was no greater or other consideration for the note than defendants' receipt of the title to the lots, which was not worth more than they paid as interest on the note.

The demurrer was based on the grounds (1) that the answer shows full delivery of the note; (2) that the agreements pleaded by defendants were merged in the note, and, resting in parol, cannot be proved to contradict or vary the terms of the written instrument; and (3) that, as the note recites its own consideration, parol evidence is not admissible to change or vary the same. The case turns wholly on whether the facts pleaded constitute any defense, in law, to the interest claim on the note.

The general rule of inadmissibility of parol evidence to contradict, change, or vary the terms of a written instrument, and the reasons underlying the same, are well understood; but there are certain exceptions to that rule, which are not so familiar to the profession, nor so well settled. There seem, however, to be two well-recognized exceptions which are applicable to this case. One is, parol evidence is admissible to show that delivery was subject to a condition that upon a certain contingency or event the contract should not be binding, and the other, such evidence is admissible to show that a note has been discharged by the performance of an undertaking which it was given to secure. Thus it may be shown that what purports to be a written obligation has been discharged in accordance with the terms of a collateral parol agreement. *Sutton v. Griebel*, 118 Iowa, 78; *Marsh v. Choun*, 104 Iowa, 556. In other words, it is always competent to show by parol the nondelivery of a written instrument, or the discharge thereof. And unless the instrument be under seal, nondelivery or a conditional delivery may be shown, even if the instrument be in the possession of the obligee or his assignee. So, also, the discharge of an instru-

1. **BILLS AND
NOTES: dis-
charge; parol
evidence.**

ment in writing may be shown by parol, although the transaction involves proof of a collateral parol agreement. Some consideration for the note is, of course, presumed, under our statutes, but the exact amount thereof is not stated on the face of the note in suit; and, by statute in this jurisdiction, want or failure in whole or in part of the consideration of a written instrument may be shown as a defense, total or partial. Code, section 3070. Under the allegations of the answer, the note was not executed until after the agreements between the parties were made, and it was never intended to be more than security for another agreement, which rested in parol, it is true; and the case falls within the rule announced in *Marsh v. Chown*, *supra*. See, also, *Beaty v. Carr*, 109 Iowa, 183.

But appellee contends that it is not competent to show by parol a conditional delivery to the payee. This is the rule as to deeds, and perhaps all contracts under seal, but it does not apply to simple contracts. *McCor-*
 2. CONDITIONAL
 DELIVERY:
 parol evi-
 dence. *mick Co. v. Morlan*, 121 Iowa, 451. The cases
 we have cited clearly distinguish those which
 have been called to our attention by appellee's counsel, and we need not take time to point out the differences. *Gifford v. Fox*, 2 Neb. 30 (unofficial) (95 N. W. Rep. 1066), supports our conclusions in this case. *Pierpont v. Longden*, 46 Conn. 499, relied upon by appellee, differs from this case, in that there the delivery was unconditional, and the parol agreement was that the note should be void at the payee's death. Here the delivery was only as security for the main promise, which was in parol, and the note was never delivered otherwise than as security for the fulfillment of this promise. Moreover, the letter which is set out in the answer, which should, of course, be construed with the other writings, as it was a part of the transaction, shows that the defendants' contention is correct. At least, there was enough in it to take the case to a jury. It also shows that the entire agreement was not embodied in the writing, and resort to parol

evidence may be had to establish the part not in writing. *Sutton v. Weber*, 127 Iowa, —.

For each and all of these reasons, it appears that the trial court was in error in sustaining the demurrer, and the judgment must be, and it is, therefore, *reversed*.

JOHANNES ANDERSON, Appellant, v. THEODORE HALVERSON,
Appellee.

Dogs: KILLING OF SHEEP: EVIDENCE. Evidence that defendant, after
1 learning of the loss of plaintiff's sheep and that his dog was
charged with their destruction, killed the dog and remarked that
"it would kill no more sheep," was admissible in an action for
damages as an admission of liability.

Damages: APPORTIONMENT. Under Code, section 2340, where more
2 than one dog was engaged in killing sheep, the owner of each is
liable only for the damage done by his dog, and the amount of
damage and an apportionment thereof is for the jury to deter-
mine.

Appeal from Buena Vista District Court.—HON. W. B.
QUARTON, Judge.

THURSDAY, DECEMBER 15, 1904.

ACTION at law to recover damages done by defendant's
dog. Trial to a jury. Directed verdict for the defendant,
and plaintiff appeals.—*Reversed*.

Helsell & Schultz, for appellant.

F. F. Faville, for appellee.

DEEMER, C. J.—Plaintiff claims that defendant is the
owner of a dog which went upon his premises and killed and
injured more than 40 head of sheep and lambs. Defendant's
answer is a general denial. At the conclusion of plaintiff's

testimony defendant moved for a verdict because there was no evidence to show that defendant's dog killed or injured any of plaintiff's sheep; because there was no evidence that the dog which did the damage belonged to the defendant; and for the further reason that, according to the testimony, the sheep were injured or killed by the joint act and trespass of two dogs, one of which did not belong to the defendant; and that plaintiff has failed to show how much of the damage was done by the dog which it is claimed belonged to the defendant and how much by the other dog, which it is conceded he did not own. This motion was sustained, and the ruling thereon is the basis of this appeal. That plaintiff lost and had a number of sheep injured by one or more dogs on the night of June 8, 1903, is so clearly shown as to be beyond the pale of dispute. Plaintiff and others heard a disturbance among the sheep, and, going to their pen, found a yellow dog biting and jumping around after them. Immediately upon being discovered, the dog fled, and was next seen lying on defendant's porch. There was another dog outside the shed, and at least sixty feet away, when plaintiff discovered the trouble. When the yellow dog was seen on the defendant's porch the next morning, he was covered with sheep dirt. It was admitted that the dog found on defendant's porch belonged to him. The ownership of the other dog is not disclosed.

Plaintiff offered to show that defendant, after hearing of the loss of plaintiff's sheep, and knowing that his dog was charged with being the author of the trouble, killed him, and remarked that "it would kill no more sheep." The court sustained an objection to this offer, and in this committed an error. The offered testimony was in the nature of an admission made by the defendant, proper for a jury to consider in arriving at its verdict.

II. From the summary which we have made of the testimony, it is clear that the case should have gone to the

jury, unless there be something in defendant's third ground of motion — that there is nothing in the record to show the amount of the damage done by his dog. Appellant's contention that defendant is responsible for the entire damage no matter how much was done by another dog, is unsound. Under the statute as it existed when this cause of action arose, defendant was responsible only for the damages done by his dog. Code, section 2340. That statute has since been amended, but with that amendment we have nothing to do. The dogs were joint wrongdoers if they acted in concert in killing or injuring plaintiff's sheep, but the owners thereof were not. In the absence of statute, the owners of the respective dogs are simply liable for the damages done by their dogs, and not for that done by dogs belonging to others. *Denny v. Correll*, 9 Ind. 72; *Russell v. Tomlinson*, 2 Conn. 206; *Buddington v. Shearer*, 20 Pick. 477; *Dyer v. Hutchins*, 87 Tenn. 198 (10 S. W. Rep. 194); *Adams v. Hall*, 2 Vt. 9 (19 Am. Dec. 690). Our statute as it existed when this cause of action arose is simply a codification of the common law with reference to several liability. The cases relied upon by appellant are all based upon statutes imposing joint liability, and hence are not in point. Under the common-law rule it is proper for the jury, after hearing all the testimony, to apportion the damages, in the event they found that the injuries were inflicted by two or more dogs belonging to different persons. *Wilbur v. Hubbard*, 35 Barb. 303; *Buddington v. Shearer*, *supra*. If the dogs were apparently of equal powers for doing damage, and there are no circumstances to render it probable that one did more than the other, there is good ground for saying that each owner should be held liable for an equal share of the damages. See cases cited above. However, the matter is after all a question for a jury under proper instructions. In the instant case the jury might have found from the testimony adduced that defendant's dog did a large share, if not practically all, of the

damage, although a finding apportioning the same would not have been disturbed. We think the case should have gone to the jury on every proposition argued, and that the trial court was in error not only in its ruling on evidence, but in sustaining the motion for a verdict.—*Reversed.*

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| 132 | 52 |

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IN THE MATTER OF THE APPLICATION OF E. F. SMITH, for
a permit to buy, keep and sell intoxicating liquors.

Intoxicating liquors: TRIAL OF APPLICATION FOR PERMIT: APPEAL.

- 1 The trial of an application for a liquor permit, to which objections are filed, is a special action or proceeding in which the remonstrants have such an interest as entitle them to appeal from an order granting the permit.

Pleadings: EVIDENCE. An applicant for a permit to sell liquor must

- 2 allege and prove that he has been lawfully conducting a pharmacy for the six months preceding, and where it appears that he has recently surrendered a permit after an action for its revocation had been instituted, he should probably be required to allege and prove that he has not knowingly made unlawful sales for two years prior to his application. Evidence held insufficient to authorize the granting of a permit.

Appeal from Kossuth District Court.—HON. W. B. QUARTON, Judge.

THURSDAY, DECEMBER 15, 1904.

THE applicant was granted a permit, and the remonstrants appeal.—*Reversed.*

Ryan, Ryan & Ryan, for appellants.

George E. Clarke, for appellee.

SHERWIN, J.—A motion to dismiss the appeal was submitted with the case, without argument thereon by either side, and we shall first consider the several points made

therein. The appellants contested the application for a permit by filing a written remonstrance under the provisions of section 2389 of the Code, whereupon a trial was had upon the petition and remonstrance, and after a full hearing the permit was granted, and an appeal perfected by the remonstrants. The motion to dismiss is based upon the contention that an appeal does not lie in these cases, and that the contestants have no interest in the proceeding entitling them to an appeal. The section of the statute to which we have referred expressly provides that any citizen of the county wherein the application is made may offer and file a remonstrance or objections to granting the permit, and that when a remonstrance is so filed a trial shall be had and the issue be determined by the court.

The statute in question, so far as the point now under consideration is involved, is practically the same as section 1530 of the Code of 1873, which provided for the granting of permits to sell intoxicating liquors by the board of supervisors of the county, and under that statute we held that a remonstrant became, in effect, a party to the proceeding, with the right to have it reviewed and the errors and irregularities therein corrected. *Darling v. Boesch*, 67 Iowa, 702. The second clause of section 4101 of the Code provides for an appeal from "a final order made in special actions affecting a substantial right therein." We think there can be no question that the trial of an issue of this kind is a special action or proceeding, or that the granting of or the refusal to grant a permit is a final order within the meaning of the statute. We so held, in effect, in *State of Iowa v. Schmidt*, 65 Iowa, 556. Furthermore, we held therein that an appeal would lie. The motion to dismiss is therefore overruled, as is also the motion to strike the abstract.

While it is true that the matter of issuing permits is one which must of necessity be left largely to the sound discre-

tion of the trial court, it is still the duty of this court to see that the requirements of the statute have been fully met before a permit shall issue.

2. PLEADING:
evidence. The statute requires the applicant to allege in his petition and to prove that he has been lawfully conducting a pharmacy for the six months last past, and in this we think the applicant signally failed. It is true there was no formal revocation of the permit which he had shortly before held, but the fact that he surrendered it under pressure after an action for its revocation had been instituted should have been sufficient ground for denying this application, especially in view of the fact that there was no attempt upon his part to prove that his pharmacy had been conducted in a lawful manner as far as the sale of intoxicating liquor was concerned. In fact, his own testimony was practically an admission that he had been unable to so conduct it. We are also inclined to the opinion that the surrender of his permit, under the circumstances shown, amounted, in effect, to a revocation thereof within the meaning of the statute, and that he should have alleged and proven that he had not knowingly been engaged in the unlawful sale of liquor within the last two years next before making the application. See *In re Thoma*, 117 Iowa, 275; *In re Wilhelm*, 124 Iowa, 380; *In re Henery*, 124 Iowa, 358. But whether this be so or not, the surrender was made under circumstances indicating very strongly that the applicant did not wish to chance the result of a trial, and, as we have said, was a strong circumstance tending to show that he had not been lawfully conducting his business, and, considered with the other evidence in the case, almost conclusively proved that the applicant was not entitled to a permit because he had failed to furnish the proof required.

We are of opinion that a mistake was made in granting a permit in this case, and the judgment is *reversed*.

JAMES FINDLEY, ET AL., appellants, v. JORGEN KOCH, ET AL.

Specific performance: CONTRACT FOR THE SALE OF LAND. Where a
1 written contract for the sale of real estate states that the persons
executing the same are acting as agents for the owner who after-
wards in writing accepts the contract as his own, it becomes in
legal effect an agreement between the purchaser and owner.

Specific performance: EVIDENCE. In an action for specific perform-
2 ance of a contract to convey land, the evidence is reviewed upon
which it is held that by plaintiffs' neglect to carry out the contract
they had forfeited the right to specific performance and damages.

Specific performance: DELAY. Unreasonable delay in insisting on
3 performance, and negligence in carrying out the contract, will
defeat specific performance, although time is not specifically made
the essence of the contract.

Specific performance: WHEN DENIED: EVIDENCE. Equity requires of
4 a purchaser of land the utmost good faith on his part in attempting
to carry out the contract, before specific performance will be de-
creed at his suit, and if his delay renders performance inequitable
or unjust to the seller it will be denied. Evidence held to show
such delay and inaction on the part of the purchaser as to justify
a refusal of specific performance.

Damages. A purchaser of land who is not entitled to specific per-
5 formance of the contract because of his lack of diligence in assert-
ing his rights thereunder, is not entitled to damages for the ven-
dor's refusal to convey, after the lapse of a reasonable time.

Recovery of purchase money. A recovery of earnest money by a
6 purchaser of land who has lost his rights under the contract,
cannot be had in a suit for specific performance by way of dam-
ages.

Appeal from Clay District Court.—HON. A. D. BAILIE,
Judge.

THURSDAY, DECEMBER 15, 1904.

ACTION against defendant Koch for specific perform-
ance of contract to convey land, with the additional prayer

that if defendants be found not able to perform their contract, then that plaintiffs have damages on account of the increased value of the land after the making of the contract, and also for the loss of the rental value; and, further, that if for any reason plaintiffs are not entitled to such relief, then that they have judgment against defendants for \$1,500 paid by plaintiffs on the purchase price. Defendants interposed counterclaims for damages on account of failure by plaintiffs to perform the contract. On the trial the court dismissed plaintiff's petition and defendants' counterclaim, reserving to the plaintiffs the right to bring an action at law to recover the money paid, and to defendants the right to sue on their counterclaims. From this decree both plaintiffs and defendants appeal, but plaintiffs will be treated as appellants.—*Affirmed.*

Gilchrist, Whipple & Brown and G. H. Martin, for appellants.

F. H. Helsell and Buck & Kirkpatrick, for appellees.

McCLAIN, J.— Counsel for appellees contend that the contract to convey was not made by plaintiffs with defendant Koch, but with Everett & Blow, real estate agents, who agreed to furnish abstract, conveyance, etc., and that the money was paid to this firm, and therefore no action can be maintained against Koch. But this is clearly an erroneous interpretation of the written contract, which explicitly states that Everett & Blow acted as agents for Koch, the owner of the real estate referred to in the contract. It further appears that Koch in writing accepted the contract as his own. We have, therefore, in legal effect, a written contract between plaintiffs and Koch for the conveyance of the property, and can direct our attention at once to the question whether plaintiffs are entitled to specific performance thereof, or damages for its breach.

1. CONTRACT FOR
THE SALE OF
LAND.

The material facts shown by the evidence are that the written contract was made and accepted by Koch in August, 1900, providing for payment of \$1,000 in cash and \$500 in

2. SPECIFIC PERFORMANCE:
evidence.

October, and the balance of the purchase price March 1, 1901, save that the purchasers were to assume a mortgage of \$12,000. The seller was to furnish certified abstract and a good warranty deed, and deliver them to the bank on or before said 1st day of March. The price was specified to be \$36 per acre, and the premises were described as containing six hundred and forty acres, more or less, according to the government survey. At the end of the contract, the following provision was incorporated: "It being mutually understood that in case said section overruns in acres, said [purchasers] are to pay for same at the rate of \$36.00 per acre, for what acres said J. Koch can furnish abstract showing perfect title." About March 1st, Koch submitted to the plaintiffs a certified abstract showing good title, and a deed not executed, and claimed that the plat of the county surveyor accompanying the abstract showed the tract to contain seven hundred and twenty-nine acres, for which he insisted that payment should be made at the specified price per acre. No substantial objection was made to the abstract or deed, but a controversy at once arose between the parties as to the number of acres in the tract, and plaintiffs, without tendering payment for any specific number of acres, refused to pay for the number of acres for which Koch claimed that they should pay, and asked for further survey. It appears that during the fall of 1900 Koch, who was living on the land and occupying a part of it as his homestead, sold off a large quantity of live stock and machinery which he had been keeping and using on the premises, and made arrangements to remove therefrom, and one of the plaintiffs, without any right under the contract to do so, but by permission of Koch, went upon the land and did some fall plowing. This temporary possession of plaintiffs did not, however, continue until March 1st, and,

when it became apparent during March that plaintiffs were refusing to take the land, Koch resumed the use thereof for farming purposes, and planted crops. Before the end of March a good warranty deed, signed by Koch and his wife, was deposited in the bank, and negotiations were continued with reference to the carrying out of the contract, until September 14th, when Koch's attorneys notified the attorneys for plaintiffs, through whom negotiations had been conducted, that in their judgment plaintiffs had forfeited all their rights under the contract, and that Koch would not convey. No other action was taken by plaintiffs in the matter until this suit was brought on the 20th of August, 1902. The contention of appellees in the lower court was that, by failure and neglect on the part of plaintiffs to carry out their contract, they had forfeited the right to specific performance and to damages for failure to convey; and that, if they had any right of action for the recovery of money paid, it should be prosecuted in an action at law; and the trial court rendered a decree in accordance with these contentions.

The written contract to convey did not contain any specific provision that time should be deemed of the essence of the contract. Nevertheless, if plaintiffs unreasonably delayed insisting on performance, and were

3. SPECIFIC PERFORMANCE: de-
lay.

negligent in carrying out the terms of the contract on their part, they cannot now have a specific performance. It appears beyond controversy that Koch was put to considerable expense and suffered material loss by selling off his live stock and farm machinery in anticipation of the performance of the contract by plaintiffs, and in purchasing other machinery and animals for the purpose of resuming farming operations in the spring of 1901, when it appeared that the contract would not be performed within the time agreed upon. It further appears that, while the contract price was perhaps the reasonable price for the land at the time the contract was made, the market value of land

in the vicinity increased very materially soon after the contract was made, and, if it is now enforced, the plaintiffs will realize a large profit on account of such advance.

Without elaboration, we think the real question before us is this: Did the plaintiffs negligently fail to take such steps as they should have taken toward the carrying out of the contract until they found that the value of the land had materially increased, and then attempt to enforce specific performance merely because of this increase in value, and not on account of the continuing purpose to carry out the original contract? If so, they are not entitled to relief, for the purchaser has no right to speculate with the seller, practically abandoning the contract so far as its performance is concerned, until he finds that to insist upon performance will be of material advantage, and then, against the interests of the seller and to his prejudice, insist that the contract shall be performed. A court of equity, in the matter of specifically enforcing a contract to convey, will insist on a showing of the utmost good faith on the part of the purchaser, and require that he make it appear that he has been ready, willing, able, and even eager throughout to have the contract enforced, and will refuse relief if, on account of his negligence or unwillingness at any time to perform his part, the performance has been delayed, especially if such delay renders performance inequitable and unjust to the seller. *Giltner v. Rayl*, 93 Iowa, 16; *Gish's Executor v. Jamison*, 96 Va. 312 (31 S. E. Rep. 521); *Powell v. Berry*, 91 Va. 568 (22 S. E. Rep. 365); *Kirby v. Harrison*, 2 Ohio St. 326 (59 Am. Dec. 677); *Lewis v. Woods*, 4 How. (Miss.) 86 (34 Am. Dec. 110); *Planer v. Equitable L. Assur. Soc.*, 55 N. J. Ch. 260 (37 Atl. Rep. 668); *Willard v. Tayloe*, 8 Wall. 557 (19 L. Ed. 501).

Without going into the details of the evidence, it is sufficient to state our conclusion, which we reach after investigation of the record, that the plaintiffs practically aban-

4. SPECIFIC PER-
FORMANCE:
when denied;
evidence.

doned this contract, and for more than a year were in the situation of not desiring or expecting to perform, on their part, before they elected to institute this action. Indeed, they never offered to perform on the basis of any specific number of acres as contained in the tract, until during the trial it was stipulated that the tract actually contained six hundred and ninety acres. Koch based his claim to be paid for seven hundred and twenty-nine acres on the certificate of the county surveyor, which, so far as we can discover, he had the right in good faith to assume to be correct. Plaintiffs, on the other hand, while insisting that this estimate was erroneous, took no steps to have the correct number of acres ascertained and offer payment on that basis. It is true that at one time the attorneys for plaintiffs in the transaction proposed that the parties mutually agree upon some arrangement for a survey, by which the expense thereof should fall on plaintiffs if Koch's claim as to the number of acres was correct, while it should fall upon Koch if the number of acres claimed by him was found to be incorrect. But we are of the opinion that something more than this was required of plaintiffs if they desired in good faith to carry out the contract. They should have ascertained for themselves what amount they were willing to pay, and exhibited some readiness and ability to make such payment if their estimate should be acceded to.

Many other questions are discussed, but what we have said, in our judgment, disposes of the substantial merits of the case. If plaintiffs are not entitled to specific performance

5. DAMAGES. because of want of equity, when they might have had the contract performed had they proceeded with diligence to assert their rights under it, they are not entitled to damages for breach of the contract; for the same reasons which can be urged against specific performance can also be urged against the action for damages where the vendor has been able and willing to perform his part of the contract, and his failure to perform has been

due to want of willingness to perform on the part of the vendee.

Counsel for appellants seem to take the position, however, that, even though they are not entitled to specific performance or damages for breach, they nevertheless are entitled in this action to recover the purchase money paid. We do not feel called upon to discuss the question whether in any event they can be entitled to have back the money paid, where the failure of vendor to carry out the contract has been due to their own fault. If there is any such right of recovery, it is subject to a counterclaim for any proximate damages resulting to defendant Koch from the breach of the contract on the part of plaintiffs. But these questions are not for determination in this action. Of course, in an action for specific performance, the plaintiff may have relief by way of damages, if, on account of any fault or wrong on the part of defendant, or any change of condition not due to the plaintiff's fault, equitable relief by way of decree for specific performance cannot be effectually afforded. But certainly a court of equity in an action for specific performance cannot render damages on account of the refusal of the defendant to return the purchase money paid. Such relief cannot be predicated on breach of contract to convey, but, if available under any circumstances, is to be secured in an action sounding in *quasi* contract. The trial court was right, therefore, in dismissing plaintiffs' bill, saving to the plaintiffs the right to sue at law by way of original action, and to defendants the right to interpose by counterclaim, or to prosecute in an original action any claim which may exist on account of plaintiff's breach of contract.—*Affirmed.*

6. RECOVERY OF
EARNEST
MONEY.

A. N. FRIES v. BETTENDORF AXLE COMPANY, Appellant.

Master and servant: NEGLIGENCE: INSTRUCTION. In an action for injuries to an employe working at a machine as helper, a charge that if the employer failed to use ordinary care in keeping the machine in repair, but at the time of the accident it was in a defective condition and the defect was known or on the exercise of ordinary care would have been known to the employer, then on so finding the employer was guilty of negligence, and unless they so found the verdict must be for the defendant, was not erroneous as assuming that the machine was in a defective condition.

Appeal from Scott District Court.—HON. JAMES W. BOLLINGER, Judge.

THURSDAY, DECEMBER 15, 1904.

SUIT to recover damages for personal injuries received while in the employ of the defendant. Trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

Cook & Dodge, for appellant.

W. M. Chamberlain, for appellee.

SHERWIN, J.—The plaintiff was working as a helper at a tire-bending machine which had two main rollers, between which the tires were passed, and a smaller roller situated about an inch therefrom, known as the "silent roller." The machine was stopped by the operator, and while he was temporarily absent therefrom, the plaintiff, in attempting to oil the silent roller, had his hand caught and crushed by the main rollers. The machine was run by a belt, and was started and stopped by the use of a lever and clutch which threw it into and out of gear. The plaintiff alleged in his

petition, and testified upon the trial, that at the time he was injured the machine started of its own accord, and that he did not know that the rollers were revolving until his hand was caught. There was also evidence tending to show that the clutch had become so worn that the machine would frequently start of its own accord, and that the defendant knew of this condition long before the accident, and had partly, and only partly, remedied the defect, the latest attempt to do so having been on the day of the accident or the day before. The court instructed: "If you believe from all the evidence that the defendant did not use ordinary care in the premises, but at the time of the accident the tire bender was in a defective condition — that is, dangerous to those working at or near it, because it would sometimes start and revolve its rollers of its own accord without being thrown into gear by any one — and that said tendency to start of or by itself was known to the defendant, or in the exercise of ordinary care would have been known to it, then, and upon your so finding, the defendant is guilty of negligence. Unless you so find, you need inquire no further, for your verdict must then be for the defendant." The appellant says this instruction assumes that the tire bender was in a defective condition because it would sometimes start and revolve its rollers without being thrown into gear, and is therefore erroneous, because one of its witnesses testified that such starting was not an indication of a defect in the machine. We think the instruction correct. It left the question of defect to the jury, and said, if it found the machine defective on account of the matter complained of, it might charge the defendant with negligence. There was evidence tending to show that this condition was a defect, and in fact the common sense and knowledge of the jurors would almost warrant a finding that it was, and the jury was not bound to treat the defendant's evidence on this point as conclusive. A defect is a fault: "A want or lack of anything; especially, a lack of something which is essential to perfection

or completeness." Century Dictionary; *Bliven v. City of Sioux City*, 85 Iowa, 346. A machine constructed to be thrown into and out of gear by a lever and clutch, which cannot be controlled thereby, but starts of its own accord, may well be found to be "defective," within the meaning of the word, notwithstanding the opinion of witnesses to the contrary.

There was sufficient evidence of the defendant's negligence and of the plaintiff's freedom from contributory negligence to take the case to the jury, and the judgment must be, and it is *affirmed*.

H. T. SYLVESTER, Appellee, v. J. E. AMMONS, and A. W. MITTERER, Appellants.

Chattel mortgages: INCONSISTENT PROVISIONS: RIGHT TO FORECLOSE.

- 1 The written portions of an instrument will control the printed provisions where the same are inconsistent, so that where it appeared from the terms of a note and chattel mortgage covering a stock of goods, that the mortgagor reserved the right to handle the same in the regular mercantile way and that the indebtedness should be paid from the sales of the stock, a printed provision that the mortgagee might take possession whenever he chose, was inoperative.

Replevin by mortgagor: PLEADINGS. In the recovery of personal prop-

- 2 erty claimed to have been wrongfully taken under a mortgage, it is competent to allege and prove that the mortgage was procured by fraud, and that it is without consideration.

Replevin: COUNTERCLAIM. An independent cause of action cannot be

- 3 pleaded in a replevin action either as a counterclaim or otherwise as a defense.

Fraud: COST PRICE OF GOODS: EVIDENCE. On an issue as to whether

- 4 the seller of a stock of goods who was to receive compensation based on the cost price, had fraudulently raised the cost mark on the goods, it was proper to permit a witness of long experience in the mercantile business to state whether the marks on the goods were the original cost mark; and that the stock was old, it appearing that the marks on the goods were fresh.

Same. On an issue of fraud in the valuation of a stock of goods, a witness of experience who has familiarized himself with the stock is competent to estimate the difference between the actual wholesale cost of the entire stock as inventoried by him, and the inventory as furnished by the seller.

Same. The testimony of the seller of a stock of goods that he marked the same upon an explanation of the original cost mark from his vendors, without giving the explanation, was subject to the objection that it was hearsay; and his belief that the goods as finally marked bore the wholesale price was also inadmissible.

Replevin: INSTRUCTIONS. In replevin of a stock of goods taken by a mortgagee in an attempt to foreclose a mortgage given for part of the purchase price, where the only issue submitted was failure of consideration, an inadvertent reference to a claimed fraud in invoicing the goods was without prejudice; and an instruction that if the seller or one in his employ changed the cost price of the goods so as to increase the mortgage debt the plaintiff could recover, was proper.

Sales: COST PRICE. Where a retail dealer sold his entire stock under a contract that the consideration should be based on the cost price, reference was had to the wholesale cost price without regard to the price marked on the goods.

Appeal from Hardin District Court.—HON. J. R. WHITAKER, Judge.

FRIDAY, DECEMBER 16, 1904.

ACTION in replevin. Judgment for plaintiff, and both parties appeal; that of defendants being perfected first. *Affirmed.*

Albrook & Lundy and *R. F. Graham*, for appellants.

Huff & Huff and *J. H. Scales*, for appellee.

LADD, J.—On the 24th day of February, 1902, D. W. Townsend, as agent of the plaintiff, entered into a contract by virtue of which he conveyed to the defendant, J. E. Ammons, a hotel property at Independence, Iowa, and some land in Missouri, estimated to be worth \$7,700, in consideration of

which the latter delivered to said agent a certain stock of merchandise at Eldora, this State. Under the agreement the goods were to be inventoried "at cost price as shown upon the goods, except such goods as be damaged, and they to be taken at their actual worth." Ammons acted for himself in making the inventory, and Townsend was represented by one Smith, who had acted as Ammons' agent in effecting the deal. The invoice amounted to \$11,075, and Townsend, acting for the plaintiff, executed a note to Ammons for the sum of \$3,375, the difference between estimated values of the properties exchanged, and a chattel mortgage on the stock of goods to secure its payment. This occurred on the 26th day of February, and about the middle of March Ammons seized the entire stock under the mortgage, and proceeded to foreclose the same. In this action, begun March 20th, the goods were replevined, the plaintiff alleging (1) that the terms of the mortgage were not such as to authorize the mortgagee to take possession whenever he might choose, and, (2) by way of an amendment to the petition, that the mortgage was without consideration, for that the cost marks of the goods had been fraudulently raised by Ammons, and invoice "padded" by including goods not in the stock.

I. The plaintiff had paid the proceeds of sales in strict conformity with the terms of the note, and the only excuse urged for seizing the property is a condition of the mortgage authorizing the mortgagee so to do whenever he should choose. The court instructed the jury that the mortgagee had that right, and this view is challenged by plaintiff's appeal. An examination of all the instruments has convinced us that such was not the intention of the parties. The mortgage provides that "the right to move said goods to some other place in Iowa is reserved, subject to giving the mortgagee notice in writing of said place and time of removal; mortgagee also reserves the right to handle said goods in a regular legitimate mercantile way"; that the amount secured should be paid

1. CHATTEL
MORTGAGES;
inconsistent
provisions;
right to fore-
close.

"according to the terms of one promissory note"; and also that, "in case of default made in the payment of the above-mentioned promissory note, or in case of my attempting to dispose of or remove said goods only as stipulated in note of the aforesaid goods and chattels, or any part thereof, or whenever the said mortgagee shall choose so to do, then and in that case it shall be lawful for the said mortgagee or his assigns by himself or agent to take immediate possession of said goods." Other portions of the mortgage are similar to those usually found in such instruments. The portion quoted is in harmony with the language of the note in connection with which and the contract the mortgage should be construed:

For value received I promise to pay J. E. Ammons or order thirty-three hundred and seventy-five dollars as soon as the money can be obtained from the sale of a certain stock of clothing for which this note is given as a part of the purchase money. All money received is to be turned over as fast as received less necessary and legitimate expenses, which are not however to exceed the sum of one hundred dollars per month. The right to remove these goods to some other place in Iowa is reserved and also the right to handle these goods in a regular mercantile way which is agreed to.

Thus the money to pay the note was to be obtained from the sale of the goods, and to accomplish this the "right to handle the goods in a regular mercantile way" was reserved to the mortgagor both in the note and mortgage. That right was not parted with. That was the right Townsend was exercising when the defendant Ammons seized the stock. It was essential, in order to enable him, as agent of the plaintiff, to reduce the goods to money out of which, by the terms of both instruments, the indebtedness was to be paid. Only by the continued possession of the property could sales "in the regular mercantile way" be effected, and to guard against any interferences therewith the reservation was incorporated into the mortgage. That the seizure of the goods by Ammons was in derogation of this reserved right, in that it de-

prived the mortgagor of the opportunity "to handle said goods in regular legitimate mercantile way," seems too plain for argument. Certainly the plaintiff could not proceed with the sale of the stock as merchants usually do while Ammons was in possession and proceeding to foreclose. If so, the printed clause permitting the mortgagee to take possession whenever he might choose was inconsistent with the written reservation of the right to sell in the regular mercantile way; and the latter, for that it was in writing, must prevail. Section 4616, Code: *Robinson v. Gray*, 90. Iowa, 699, and like cases, are not in point.

II: An amendment to the petition was filed, alleging that the cost marks on the goods were fraudulently raised so as to increase the apparent cost from thirty to one hundred per cent., and the invoice padded by including goods not in the stock, and that the mortgage was without consideration for that the stock, if invoiced at cost price, did not exceed the estimated value of the property exchanged for it. The defendant moved to strike this amendment because an attempt to attach to an action in replevin an issue not triable therein. There was no error in overruling the motion. The issue in replevin is always which of the parties was entitled to possession at the commencement of the action. *Hilman v. Brigham*, 117 Iowa, 70. If there was entire want of consideration in the mortgage, the defendants had no right to enforce it, and the ground asserted was a proper one on which to base plaintiff's claim to possession.

III. The defendants then added a counterclaim to their answer, averring that Townsend had fraudulently misrepresented the value of the real estate exchanged for the stock of goods, and thereby induced Ammons to allow a price therefor exceeding its value more than the face of the note and mortgage. A demurrer to this was rightly sustained for the reason that the filing of a counterclaim in a replevin suit is prohibited by statute.

2. REPLEVIN BY
MORTGAGOR:
pleadings.

3. REPLEVIN:
counterclaim.

Thereupon the same matter was pleaded in an amendment by way of defense on the theory that, even though the allegation of the amendment to the petition were true, the amount was offset by the difference between the actual and represented values of the real estate. A motion to strike this was sustained. It will be recalled that the mortgage was executed to secure the excess of the invoice over and above the estimated value of the real estate. The contention of plaintiff is that there was no such excess. If so, then the mortgage was without consideration, regardless of whether the valuation of the real estate was procured by fraud. Fixing that value was independent of the making of the invoice. Any fraud therein might well be urged as a ground for avoiding the original contract of exchange, but furnished no answer to the charge that in executing that contract a mortgage was obtained without consideration, through deceit. In other words, it is no answer to the charge of fraud in one transaction to allege that plaintiff had indulged in similar deceit in another. See *Whitworth v. Thomas*, 83 Ala. 308 (3 South. Rep. 781, 3 Am. St. Rep. 725). Irrespective of the name by which the amendment was disguised, it, in effect, pleaded a counterclaim, and the ruling of the court in striking it was correct.

IV. The inventory was taken "at the cost price as shown upon the goods, except such goods as were damaged, and these to be taken at their actual worth." The fraud charged was that Ammons "padded" the in-

4. FRAUD: cost price of goods; evidence. voice and raised the cost marks on the goods.

To establish this, it was shown that after the stock was replevined Townsend caused another invoice to be taken by C. E. Petty and L. G. Ward, from which it appeared from the highest marks on the goods that the stock amounted to \$9,380.04. Up to that time Townsend had received on sales \$516.14 and Ammons \$93.55. Petty had enjoyed an experience of fifteen years in the mercantile business at Eldora, and was asked whether the mark on the goods

was the original cost mark. This was objected to on the ground that the witness had not shown himself competent. We think that his experience as a merchant and his examination of the tickets attached to the articles in the course of making the inventory qualified him to express an opinion as to the character of the marks on the several articles. Ordinarily, these are letters or hieroglyphics, which by the use of a key advise the merchant of the cost at wholesale without disclosing it to his patrons. Of course, Petty could not have known what the goods in fact cost, but his experience in handling similar goods enabled him to say with some degree of certainty whether the prices thereon so nearly approximated the usual wholesale or retail price as to indicate which was intended. This was illustrated by a subsequent answer that, "as a rule, the marks were what the goods usually retailed at."

Complaint is made of rulings by which this witness was allowed to state that the stock was old. This was admissible as a circumstance tending to show that the marks on the goods, which were shown to have been fresh, were not the original cost marks.

Both Petty and Ward were allowed to estimate the difference between the actual cost at wholesale of the entire stock as inventoried by them and the amount of their invoice.

5. SAME. Appellants insist that neither of them was shown to have sufficient knowledge to enable him to answer. The record is such as to throw some doubt on the value of their opinions as expressed, but not such as to have required the court to reject them altogether. They were men of long experience in the business, and had thoroughly familiarized themselves with the stock by taking the invoice. In doing so they had observed the marks with a view of ascertaining their meaning. True, they had not estimated each article separately, nor was this essential in order to qualify them to form a judgment as to the entire stock. If from the examination of the invoice in connection with

knowledge obtained by the inspection of the goods, they were able to form some opinion of the wholesale cost of the stock, it was sufficient. *Phelps v. Sampson*, 113 Iowa, 145. The rule that any one familiar with the values in question may testify is uniformly construed liberally. See Wigmore on Evidence, section 716. Petty at first said he could not make an estimate; that it would be a mere guess; but afterwards concluded that by examining the invoice he could form a judgment "in a way." All intended by this was that he could not be accurate in his judgment of what the cost of the goods at wholesale might have been. There is no standard of value at wholesale any more than at retail, and, of necessity, it is fixed in each case by a bargain between the seller and purchaser. So that any opinion of the cost could not be otherwise than uncertain. It was the best evidence available, however, and was competent for the purposes introduced. See *Graves v. Ins. Co.*, 82 Iowa, 637; *Enos v. Ins. Co.*, 4 S. D. 639 (57 N. W. 919, 46 Am. St. Rep. 796); *Smith v. Jensen*, 13 Colo. 213 (22 Pac. 434).

Ammons testified that the stock was originally bought by McCalmety, who transferred it to Allen & Pound, from whom he obtained it; that he put the tags on the goods from which the inventory was taken, and that the
6. SAME. cost as indicated thereon was taken from the original stock ticket, which was removed because worn out; that the cost marks were explained to him by the parties from whom he purchased, and he was then asked for the explanation given. What was intended to be elicited was not disclosed, and, in the absence of anything indicating otherwise, the objection that the question called for hearsay evidence was well taken.

The witness was then asked his belief as to whether the price he finally put on the new tickets which he attached to the goods would equal the wholesale price. Manifestly, this called for a comparison of values, rather than for the fact as to whether he had acted in the belief that the marks

bore the price at wholesale, and was not admissible as bearing on scienter.

V. In the sixth paragraph of the charge the court inadvertently remarked that plaintiff claimed a farther credit on the note by reason of the fraud alleged, but in others the issues were clearly stated, and the jury told that the claim of plaintiff was that the mortgage was without consideration. That issue only was submitted, and the jury could not have been misled by this lapse. Again, in the ninth paragraph the jury was told, if either Smith or Ammons changed the tags "so as to make the same show a greater price than the actual cost of the same," this, with other matters, might form the basis of a finding against defendants. This was correct, for Smith, at the time of remarking the goods, was in the employ of Ammons, and assisting him therein; and the circumstances were such as to leave it open for the jury to say, notwithstanding their denial, that changes as alleged were effected. The eleventh instruction is criticised for that, as is said, there was no evidence that the inventory was padded. The invoice of Petty and Ward, in connection with the stipulation of the amount of sales, supplied such evidence. Exceptions to other instructions given are equally void of merit. Those refused, in so far as containing correct statements of law, were included in the ones given.

The third instruction refused purported to construe the meaning of the clause, "at the cost price as shown upon the goods," as meaning the price on the goods, regardless of whether these represented the actual cost or not. "Cost price" is a relative term, necessarily depending for its meaning on the situation of the parties and the circumstances under which used. Thus the cost price to the importer is one thing, to the jobber another, to a retailer another, and to the purchaser from the retailer still another. *Herst v. De Comeau*, 1 Sweeny (N. Y.) 590. It is said to be what is actually paid or promised to be paid

7. REPLEVIN: instructions.

8. SALES: cost price.

for an article. *McCoy v. Hastings & Co.*, 92 Iowa, 585. As applied to a retail stock of goods, it usually has reference to the cost at wholesale, and that was the sense in which the term must have been employed in this contract. If the marks on the goods gave the retail price, or had been so tampered with as not to indicate the cost at wholesale, then the cost price was not "shown on the goods." For this reason the instruction was properly refused. Other rulings of the court challenged by appellant do not require separate consideration.

The result of the reversal on plaintiff's appeal and an affirmance on defendant's appeal is that the judgment is *affirmed*.

JAMES McLAUGHLIN, ET AL., v. THE AMERICAN FIRE INSURANCE Co., Appellant.

Insurance: CONTRACT BY AGENT: REPORT OF RISK. Where an agent
1 has authority to contract insurance on behalf of the company indemnifying the insured against loss caused by lightning, and the agent agrees to issue such a policy, the insured is not responsible for the agent's omission to correctly report the risk.

Lightning clause: INSERTION AFTER LOSS. Where the agent issuing
2 an insurance policy omitted by inadvertence to attach a clause indemnifying the insured against loss by lightning, according to agreement, he had authority to insert such a clause after loss occurred.

Completion of contract by agent. An agent's authority to issue a
3 policy of insurance continues until he has executed the policy contracted for, and the fact that he is permitted to retain the same after it is ready for delivery, while incomplete, will not render the agent the representative of the insured so as to deprive him of the authority to complete the contract.

Appeal from Clayton District Court.—HON. L. E. FELLOWS, Judge.

FRIDAY, DECEMBER 16, 1904.

ACTION on policy of fire insurance. Judgment for plaintiff on a trial without a jury. Defendant appeals.—*Affirmed.*

Dudley & Coffin, and *J. E. Corlett*, for appellant.

M. X. Geske and *D. D. Murphy*, for appellee.

McCLAIN, J.—The loss for which recovery was sought was by lightning, and the defense was that the policy did not cover such loss. It appeared, without substantial conflict in the evidence, that the insured applied to the recording agent of defendant for a policy covering loss by both fire and lightning, and that the agent, having authority to contract for insurance on behalf of defendant, agreed that such policy should be issued, the risk to attach from the time the contract for insurance was made; that the recognized method of doing business by the agent in behalf of the defendant was to attach to the form of a policy which did not cover loss by lightning a slip containing the usual lightning clause; that the policy was made out by the agent without such slip being attached thereto, and was held by him without delivery to the insured until after the loss occurred, when, noticing the omission to attach the slip containing the lightning clause, he then attached such slip to the policy and delivered it to the insured; and that he had full authority to issue policies with the lightning slip attached, and omitted to do so in this particular case through an oversight.

There is some contention on the part of appellant that the risk was reported by the agent to the defendant company without mentioning the lightning clause, but it appears that what was reported was the continuance of the risk under a previous policy, and it does not appear in evidence whether such previous policy contained the lightning clause or not. But this we think immaterial. The agent had authority to contract for insurance on behalf of defendant, and to issue policies containing

1. CONTRACT BY
AGENT: re-
port of risks.

the lightning clause, and in this case it appears that he did contract for such insurance. It was not a matter with which the insured was chargeable that the risk was not correctly reported to the company. If the agent failed correctly to report the risk, the company, and not the insured, was chargeable with the omission.

The substantial contention for the appellant is that the agent had no authority to vary the terms of a contract of insurance fully made and executed; evidenced by a written policy; and that, if by mistake the policy did not embody the agreement of the parties, the remedy of the insured was to bring an action in equity for reformation, and that he could not bring his action at law on a written policy and recover on proof of a different contract from that contained in the policy. It is not necessary, however, to elaborate the discussion of this question. We have held that where, by mistake of the agent in issuing the written policy, words have been omitted necessary to make it embody the binding contract for insurance, such words may be inserted by the agent, even after the loss has occurred. *Taylor v. State Ins. Co.*, 98 Iowa, 521. In that case we went further than it is necessary to go in the case before us in recognizing the power of the agent, for there the policy had been delivered to the insured, and was corrected after such delivery and after the loss, while here the policy had never been delivered, and the insured was not therefore, as we think, chargeable with knowledge of the terms of the instrument.

Counsel contend that, as the policy was allowed by the insured to remain in the custody of the agent after it was ready for delivery, such agent became his agent, and was no longer the representative of the company; but, conceding this to be true, the case is not taken out of the rule announced in *Taylor v. State Ins. Co.*, *supra*. Until the written policy was made to conform to the contract for insurance, it was not a completed execution of

2. LIGHTNING
CLAUSE: in-
sertion after
loss.

3. COMPLETION
OF CONTRACT
BY AGENT.

that contract, and did not relieve the company from liability under that contract. Until the agent had completely executed his authority by issuing a policy embodying the terms of the binding contract, his authority to issue a policy of insurance continued. Of course, when a written instrument is fully executed, it is presumed to embody the agreement of the parties, and any prior or contemporary oral agreement is merged therein; but if, by reason of mistake, it does not conform to the prior oral agreement, we see no reason for recognizing such a merger. It is not necessary, however, to elaborate the arguments, for we think the rule is settled for this State in the case already cited, and we have no inclination to reconsider the conclusion there announced. This is decisive of the present case, and the judgment of the trial court is *affirmed*.

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STATE OF IOWA V. RICHARD HAUPT, Appellant.

Seduction: EVIDENCE: REPUTATION OF PROSECUTRIX. On a prosecution for seduction, evidence of the general moral character of the prosecutrix, when she is a witness for the State, is admissible for the purpose of testing her credibility, but should ordinarily be confined to the time of trial.

Appeal from Greene District Court.—HON. F. M. POWERS, Judge.

FRIDAY, DECEMBER 16, 1904.

A JURY found the defendant guilty of seduction, and he appeals from a judgment on the verdict.—*Reversed*.

Gallagher & Graham, for appellant.

Chas. W. Mullan, Attorney-General, and *Lawrence De Graff*, Assistant Attorney-General, for the State.

SHERWIN, J.—A careful consideration of the evidence sustaining the charge against the defendant leaves no doubt in our minds as to its sufficiency to sustain the verdict. The instructions given fully and fairly covered the issues tried, and are free from error. The one referring to the flight of the defendant was justified by the evidence that he then knew of the complainant's condition and of her claim that he was the author thereof.

The defendant introduced evidence tending to prove that the prosecutrix was of unchaste character prior to his alleged seduction of her. He also offered testimony as to her general moral character at the time of trial and before that time, which was rejected. The prosecutrix was a witness for the State, and the offer of this testimony was made under section 4614 of the Code, for the purpose of testing her credibility as a witness. We think it should have been received. The statute says, "The general moral character of a witness may be proved for the purpose of testing his credibility." No exception is made to the admissibility of such testimony by the statute, and we cannot ingraft one thereon for application in this class of cases. The statute has frequently been applied to a defendant in criminal prosecutions who testifies in his own behalf, and we can find no substantial reason for holding it not applicable here. *State v. Kirkpatrick*, 63 Iowa, 554; *State v. Hardin*, 46 Iowa, 623. The charge of seduction puts in issue only the previous character of the prosecutrix, and this may not be assailed by testimony as to reputation or as to general moral character. When she becomes a witness, however, her credibility is to be tested and determined by the rules applicable to other witnesses. For this purpose, only, the general moral character or reputation may be shown as discrediting the witness, and not proof of a specific vice. *Kilburn v. Mullen*, 22 Iowa, 498; *Kitteringham v. Dance*, 58 Iowa, 632. Such testimony will ordinarily be confined to the time of the trial, and in cases of this character the rule should be as closely

adhered to as possible. If this be done, the accused will secure no advantage by a slanderous and unjust assault upon the character of the woman he has wronged; on the other hand, if she be not worthy of belief because of her general bad character, his rights are protected. For the error indicated, the judgment is reversed, and the case remanded.—
Reversed

P. C. WINGATE V. FRED JOHNSON, Appellant.

Breach of warranty: PLEADINGS. Where the allegations of a petition 1 indicated an intention to rely on a breach of warranty, the further allegation that defendant knew his statements to be false, did not convert the action into one for misrepresentation and fraud.

Warranty. A representation that an animal is as sure a foal getter 2 as ordinary animals of like character, is a warranty of reasonable service as a foal getter.

Breach of warranty: EVIDENCE. The actual capacity of an animal 3 for breeding purposes as demonstrated subsequent to a sale, may be shown in an action for the breach of a warranty that he was a sure foal getter.

Burden of proof. Where the defendant in an action for breach of a 4 warranty that the animal sold was a sure foal getter, pleads as a defense that its inefficiency was due to improper feed and care subsequent to the sale, he has the burden of proof on that issue.

Evidence. The effect of actual proof of the inefficiency of an animal 5 as a foal getter, is not destroyed by a showing that the animal subsequently became less efficient by improper care.

Instructions. Failure simply to fully instruct is not reversible error 6 in the absence of a request for instructions.

Evidence of value. In an action for a breach of warranty in the sale 7 of an animal, an inquiry of plaintiff whether he knew the fair market value of the animal had he been as plaintiff thought he was, while improper, is held not reversible error, as it appeared evident that plaintiff understood the question to be predicated upon defendant's representations.

Breach of warranty: VERDICT. The verdict of \$300.00 damages for 8 a breach of warranty in the sale of a jackass is held not excessive.

Appeal from Fremont District Court.—HON. O. D. WHEELER, Judge.

FRIDAY, DECEMBER 16, 1904.

ACTION to recover damages for breach of warranty in the sale of a jackass. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

W. E. Mitchell, for appellant.

T. S. Stevens, for appellee.

McCLAIN, J.—One of the assignments of error relied on to secure a reversal is that the court erroneously treated the action as one for breach of warranty, when in fact the petition shows it to have been predicated upon misrepresentation and fraud. But the allegation in plaintiff's petition is that "defendant warranted orally and guaranteed that said jackass was a first-class jack, pedigreed, as sure a foal getter as any jack, and that he was in perfect and sound condition; that he would serve mares with as much frequency and get as many with foal as any jackass"—following which were allegations of falsity in the statements alleged to have been made, worthlessness of the animal purchased, and reliance upon defendant's statements and representations by plaintiff. Certainly these allegations indicate an intention to rely upon breach of warranty, even though they contain the specific statement that defendant knew his statements to be false.

In his answer, defendant admitted that he represented to plaintiff "that said jack was as sure a foal getter as ordinary jacks in this climate and country"; and the court, in instructions to the jury, interpreted this representation as implying the ability of the animal to render reasonable services as a foal getter. This was certainly a correct interpretation of the meaning of the war-

1. BREACH OF
WARRANTY:
pleadings.

2. WARRANTY.

ranty, as admitted by defendant. We have held that the warranty of a stallion as a "foal getter" means something more than that the stallion is able to get foals, and implies that he can render reasonable service as a foal getter, being sold exclusively for such use. *McCorkell v. Karhoff*, 90 Iowa, 545.

That case also answers another contention made for appellant, to the effect that the court allowed the jury to consider the actual, proved capacity of the jack after his purchase by plaintiff to be considered as bearing upon his condition or quality in the respect warranted at the time of the sale. The complaint is that the court treated the representation as a future warranty, but there is no ground in the record for any such complaint. The evidence was restricted to the proof of those facts legitimately bearing upon the efficiency of the jack as a foal getter at the time of the sale. With reference to this question, it was proper to show what the accomplishments of the animal proved to be in this respect by trial after the sale.

If the incapacity of the jack for breeding purposes was due to lack of proper care or treatment on the part of the plaintiff, this, of course, would be a defense to the action, and the jury were so instructed. But counsel for appellant says that the court erred in

3. BREACH OF WARRANTY: evidence.
4. BURDEN OF PROOF.

directing the jury that the burden of proving such defense was on the defendant, whereas the instruction should have been that, unless plaintiff showed that the fault was not due to improper treatment, he could not be entitled to recover on the mere proof of the existence of the fault when the animal was tried. Many cases are cited for appellant in support of this claim, but they are cases in which a common carrier or other bailee, having received property in sound condition and delivered it over in damaged condition, is held to have the burden of explaining that the damage was not due to his own fault, where that fact would constitute a defense. Such cases are not analo-

gous to the one before us, where the defendant interposes as an affirmative defense the fault or neglect of the plaintiff in the care and treatment of the animal; and certainly, after the defendant had alleged the facts by way of defense, the jury could properly be told that the burden was on him to establish them by preponderance of evidence, even though the same facts might have been shown as bearing on the question whether the animal was in the same condition at time of sale as he was at the time when his want of efficiency was demonstrated by experience. The rule invoked by counsel for appellant, that the burden of proving a negative may rest upon a party by reason of the facts with reference to the matter being peculiarly within his knowledge, is not a rule determining the general burden of proof under the issues, but a regulation as to the order of introduction of evidence. It would certainly have been erroneous in this case to have told the jury that the burden was on the plaintiff to show that the proven inefficiency of the jack could not be considered as tending to show breach of present warranty unless the plaintiff established by preponderance of evidence that it was not due to circumstances intervening between the time of sale and the time that the inefficiency of the animal became apparent. But the whole controversy as raised by counsel in argument is theoretical.

Immediately after the sale the plaintiff proceeded to make use of the animal for the purpose for which he was purchased, and, while he did in fact serve some mares, it was demonstrated within a month that he did

5. EVIDENCE. not correspond to the representations made by defendant. And there is no reasonable suggestion in the evidence that within this period of time there was anything in the care or treatment of him by the plaintiff to occasion his inefficiency. That he may have subsequently become still less efficient by overfeeding or neglect did not destroy the effect of this affirmative proof.

Many others of the instructions given are complained of, but the complaint in each case resolves itself into one of failure to fully instruct, rather than of substantial error in the instructions given. As no instructions were asked, it is evident that the appellant has not made out a ground of reversal in these respects.

Plaintiff, as a witness, was allowed, over defendant's objections, to answer the question, "Do you know the fair and reasonable market value of the jack, had he been as you thought he was?" Of course, the question was not in proper form, for what the plaintiff thought was wholly immaterial, unless his expectations were reasonably based on defendant's representations; but, in the connection in which the question was asked and answered, it was plain that the witness must have understood it to be predicated upon defendant's representations.

The purchase price of the jack was \$400, and the evidence tended to show that, if he had been as represented, he would have been worth at least that much, and that, if he was worthless for breeding purposes, he was of no money value. The evidence fully supports the verdict of \$300 in plaintiff's favor.

We find no prejudicial error in the record. The judgment is *affirmed*.

IN THE MATTER OF THE ESTATE OF LUCIEN COOK, Deceased.

Estates of decedents: WRONGFUL DEATH: WHO ENTITLED TO DAMAGES. Where a widow is made the sole beneficiary under her husband's will of his entire estate, she is entitled to all moneys collected for the wrongful death of testator, to the exclusion of their children, under Code, section 3313.

Appeal from Harrison District Court.—HON. N. W. MACEY, Judge.

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FRIDAY, DECEMBER 16, 1904.

THE opinion states the case.— *Reversed*.

J. S. Dewell, for appellant.

L. W. Fallon and Rodifer & Arthur, for appellee.

WEAVER, J.— Lucien S. Cook, a resident of Harrison county, Iowa, died May 29, 1898, leaving a will making his wife, Jennie M. Cook, the sole beneficiary of his estate, and appointing her executrix, without bond. She qualified under this appointment, and thereafter presented in the district court a report of her trust, showing that the testator met his death by accident while in the employ of a railroad company, and that by settlement of a claim for damages on account of said death, which was alleged to have been caused by the company's negligence, she received for the benefit of the estate the sum of \$3,200. This report and settlement, and the money so collected as damages for the testator's death, constitute the entire estate and the only property or money received by the said Jennie M. Cook as executrix. Later she made her final report, in which she claimed and asked to be allowed the entire fund in her hands, as legatee under the will. The two children and heirs at law of the testator appeared by guardian and objected to the allowance of this claim. The objection was based upon the theory that money collected as damages for the testator's death did not pass by the will, but was to be considered as intestate property, and distributed as such. This position was sustained by the trial court, and a distribution ordered, one-third each to the widow and children. The executrix appeals.

The appeal involves the construction to be placed upon that part of Code, section 3313, which reads as follows: "When a wrongful act produces death, damages recovered

therefor shall be disposed of as personal property belonging to the estate of the deceased; but if the deceased leave a wife, child or parent it shall not be liable for the payment of debts." The argument in behalf of the appellees, if we do not misapprehend counsel, is grounded on the thought that where a wrongful act produces instantaneous death no right of action against the wrongdoer vests in the deceased, and therefore none can survive to his administrator or executor. In other words, it is said that nothing which was not property or a property right in the testator at the time of his death can pass to the widow by his will. It may be conceded, as claimed, that the right to recover such damages at all is a new right created by statute, and it was entirely competent for the Legislature to provide for whose benefit the damages collected shall be applied, and how they shall be distributed. If, for instance, it had been provided that damages on account of death should go to the parents or to the surviving widow and children, then, of course, the deceased could not by his will divert this benefit from the beneficiaries thus indicated. In most of the States where a recovery of this kind is permitted, the statute does in fact name the persons who by reason of their family relation to or their dependence upon the deceased shall recover the moneys thus obtained. The principal decisions cited by appellee have been rendered under such statutes, and do not, therefore, furnish us any controlling precedent.

Our own statute, as we have seen, requires the money to be "disposed of as personal property belonging to the estate"; and, when we have determined how the personal property belonging to the estate of Lucien S. Cook is to be disposed of, we have at hand the rule by which this case is to be settled. The deceased left a will, which, in broad and sweeping terms, after providing for the payment of his debts, gives "all the rest, residue and remainder" of the estate "real, personal and mixed," to his wife, Jennie M. Cook. That will has been duly admitted to probate, and

the testator's personal estate, whether little or much, is thereby conclusively disposed of. There is no room for any suggestion that this bequest is not sufficient to carry to the widow all the testator's after-acquired property. Having ascertained the widow to be the beneficiary of the entire personal estate, due regard to the plain letter of the law requires us to hold that she, and she alone, is entitled to receive the moneys collected from the railroad company. To reach this result, we think it unnecessary for us to decide whether, in the absence of this statute, damages on account of an instantaneous killing are, in a technical sense, a part of the estate of the deceased. We may say, however, it is certain that this court has in numerous instances proceeded upon the theory that a man's life, health, and future prospects are things having a pecuniary value to him, and that death by the wrongful act of another occasions a pecuniary loss to his estate, for which an action will lie in favor of his administrator. *Wheelan v. R. R.*, 85 Iowa, 178; *Sherman v. Western Stage Company*, 24 Iowa, 515; *Benton v. R. R.*, 55 Iowa, 496; *Rose v. R. R.*, 39 Iowa, 246; *Donaldson v. R. R.*, 18 Iowa, 280; *Berry v. R. R.*, 40 Iowa, 564.

As a part of the estate of the deceased, moneys thus derived would unquestionably be subject to the payment of debts and charges, but for the exemption which the statute provides. Indeed, if we were to hold that such damages were no part of the estate of a person whose death results from the wrongful act of another, we should render illogical and meaningless practically all of the decisions of this court in which such damages have been considered. If no settlement had been made, an action to recover the damages would, according to all precedents, lie in favor of the administrator or executor; but, if the appellees' contention be correct, it would seem that this will must be abandoned, and the right of action held to be in the widow and children. The distinction which counsel emphasizes between cases of instantaneous death and cases where death follows at some interval

after the injury is not recognized by the statute, and it would savor too much of judicial legislation for us to ingraft it upon the law of the State. But even were we to grant the correctness of appellees' contention that such damages are no part of the estate, in the strict sense of the word, as used at common law, it is nevertheless true that the Legislature, in the exercise of the power to which we have already referred, could properly provide for the distribution in the same manner and proportion which would have been observed, had they accrued directly to the deceased in his lifetime. And this, we think, is the manifest purpose and intent of Code, section 3313, already quoted.

It results from this conclusion that the decision of the district court must be, and it is, *reversed*.

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OWEN HECKER, Appellant, v. AARON BOYLAN, ET AL., Appellees.

Bills and Notes: TRANSFER: DEFENSES. Where a negotiable note payable to order is transferred by delivery and assignment, the holder becomes merely the assignee of a chose in action and takes the same subject to any defense in favor of the makers arising prior to notice of the transfer.

Default in interest payments: WAIVER. Acceptance and retention of past due interest on a note by the payees will preclude their assignees from enforcing a provision that upon the default in payment of interest the whole note shall become due, where the same was paid prior to notice of the assignment.

Appeal from Hardin District Court.—HON. J. H. RICHARD, Judge.

SATURDAY, DECEMBER 17, 1904.

ACTION on a promissory note for the sum of \$768 made by the defendants to Thompson Bros., or order, and payable at the office of the Hubbard State Bank, Hubbard, Iowa, due

on or before five years after April 2, 1900, with interest at eight per cent. per annum. The note also provided that a failure to pay interest within thirty days after it became due should, at the option of the holder, mature the whole amount of the note, principal and interest. Thompson Bros. orally transferred the note to O. F. Anderson and J. S. Bly. Bly transferred his interest in the note to plaintiff by written instrument dated August 31, 1901. On the same day Anderson, by written instrument, sold and assigned to plaintiff his interest in the note. Plaintiff brought this action July 29, 1902, to recover the full amount of the note and interest; alleging that the interest thereon had not been paid within thirty days after it became due. It is further alleged that Anderson and Bly were the real owners of the note at the time it was given. Defendants Milner and Milner, who claim to be sureties on the note, filed answer; and Boylan also filed a separate answer, tendering various issues, among which were that the note belonged to Anderson and Bly, who furnished the consideration, and that the Thompson Bros. held the same in trust and as agents for them; that the actual consideration for the note was about \$661, and that on August 31, 1901, the principal, Boylan, paid the interest on the note, with interest, to the actual owners or their agents, which has ever since been retained by them; that plaintiff knew of such payment when he acquired the note, and is bound thereby. They further alleged that prior to April 2, 1902, they paid to the Hubbard Bank all interest down to April 2, 1902, as plaintiff well knew when he purchased the note and commenced this suit, and that no interest was in fact due when this action was commenced. They also pleaded failure of plaintiff to demand interest before the bringing of his suit. Other defenses were also pleaded, which need not be set out. Boylan, who, it is claimed, was principal in the note, pleaded practically the same defenses. A reply denying the affirmative allegations of these answers was interposed by the plaintiffs. On these issues the case was tried

to a jury, resulting in a directed verdict for the defendants, and plaintiff appeals.— *Affirmed*.

Ward & Hayes, for appellant.

Tom H. Milner, for appellees.

DEEMER, C. J.— Boylan was principal and the Milners were sureties upon the note in suit. It was in fact given to Thompson Bros., although Anderson and Bly furnished the consideration therefor by meeting a shortage of Boylan as postmaster. The exact amount of money furnished by Anderson and Bly was something over \$600. After the note was taken, it remained with Thompson Bros., the ostensible payees, who were also in fact the Hubbard State Bank, until about August 28, 1901, when it was sent to Bly, with a statement that they (Thompson Bros.) would assign it at any time to the real owners in proportion to their respective interests. Just where this note was from August 28th until August 31st is not shown, but on this last-named date Anderson and Bly separately sold and assigned their interests therein to the plaintiff, stating to him that no interest had been paid thereon. Plaintiff sent the note to a banker at Iowa Falls, who notified some of the defendants that the entire amount called for by the note had matured, and that he wanted the same paid. August 30, 1901, the Thompsons notified one of the Milners of the amount paid to the government on account of the shortage, and directed him to remit interest to Bly or to him (Thompson), and to notify Bly, at Iowa Falls, that he had sent it. Pursuant to this notice either the Milners or Boylan immediately, and on August 31st, sent a check for the interest to W. J. Thompson, Hubbard State Bank. In April of the next year the makers, or some of them, sent the interest for the second year to the Thompson Bros. or to the bank. These checks were cashed, and none of the money received thereon has ever been re-

turned to the defendants. The note was never indorsed by Thompson Bros., the payees named therein, but was delivered by them, without any form of indorsement or transfer, to Anderson and Bly, the real owners, not later than August 31, 1901. Anderson and Bly did not indorse it in the regular way, but sold and assigned the same to Hecker, the plaintiff, so that the rules applicable to ordinary commercial paper will not solve this controversy. When Anderson went to the bank, the latter part of August or the first part of September, 1901, to see about the note, he asked the Thompsons if the interest had been paid, and one of them said that it had not been. Anderson then declared that "then the note is due, and I will sue on it." Instead of doing this, he conferred with his joint owner, and concluded to sell the same to the plaintiff. Plaintiff purchased the same, and took an assignment, as before stated, and, upon defendants' refusal to pay the note in full, brought suit on July 29, 1902, to collect the whole amount called for by the note. Defendants had no notice of plaintiff's ownership, or the interest that Anderson and Bly had in the note, until July of the year 1902, after all the interest payments had been made, as before stated. When Anderson went to the Thompsons to see if the interest had been paid, and was informed that it had not been, he [one of the Thompsons] said, however, that "we [meaning Thompson Bros.] could pay it at any time, and would pay it then if he [Anderson] wanted it." Anderson responded by saying: "If you should pay me the interest, I could not sell it. So I will sell it." Thompson then again offered him the interest. It seems that one of the Milners had an account current with Thompson Bros. or the bank, and had directed them to pay any of his bills or obligations that might be presented. They had not charged up this interest, as we understand it, because it was a surety debt, and he did not feel authorized to do so, although they expressed a willingness when Anderson called for the interest on the obligation. The Thompsons were never the

agents for Bly, save as they held the note for him and Anderson, but they were Anderson's agents down to the time he took the note away. Hecker had no notice, so far as shown, of any interest payments being made; and Bly was not informed thereof at any time until after he had taken the note, when he was told by one of the Thompsons that they would pay him the interest on it.

If the note had been properly indorsed by Thompson Bros. to Anderson and Bly, and by them to the plaintiff, we should have no hesitancy in finding that the trial court

was in error, under the conceded facts, in directing a verdict for the defendants. But the note, while negotiable in form, was not transferable by delivery, so as to bring the transfer within the rules of the law merchant. It was transferred by delivery from Thompson Bros. to Anderson and Bly, and they assigned their respective interests therein to the plaintiff. Under such a showing the holder is nothing more than an assignee of a chose in action, and, as such, took the instrument subject to any defense existing in favor of the makers and against the assignors before notice of the assignment by them. Code, sections 3043, 3461; *Younker v. Martin*, 18 Iowa, 143; *Franklin v. Twogood*, 18 Iowa, 515; *Johnson v. Walter*, 60 Iowa, 315.

Defendants made payments of interest to the assignors of the note, Thompson Bros., which were accepted and retained by them down to the present. Had they remained the holders thereof, this would have constituted a waiver of their right to enforce the entire note by reason of default in the payment of interest. These payments were made and accepted before they (defendants) had any notice that the payees were not in fact the real owners, and before they had any notice of the assignment to the plaintiff. Under the statutes referred to, and under the law generally, this was a defense of which

1. **BILLS AND
NOTES:** transfer;
defenses.

2. **DEFAULT IN
INTEREST
PAYMENTS:**
waiver.

they could have availed themselves in a suit brought by the assignee of the note.

There were some erroneous rulings on evidence, but, in view of the undisputed evidence, these rulings were without prejudice.

The motion to strike appellees' abstract and argument is overruled.

No prejudicial error appears, and the judgment is *affirmed*.

CHARLES A. BOYLE, a minor, by his next friend, PATRICK SHAUHNESY, Appellant, v. CATHERINE BOYLE, Administratrix of the Estate of JOHN BOYLE, Deceased, NORAH BOYLE and CATHERINE BOYLE.

Administrators: DISCHARGE: INFANT CLAIMANTS: EQUITABLE RELIEF.

The mere fact of infancy will not authorize a court of equity to set aside an order discharging an administrator, to permit the filing of a claim against the estate which is barred by the statute.

Appeal from Greene District Court.—HON. Z. A. CHURCH, Judge.

SATURDAY, DECEMBER 17, 1904.

APPLICATION to have order discharging the administratrix of John Boyle, deceased, set aside, and a claim for services alleged to have been rendered by Charles A. Boyle allowed as a claim against the estate. A demurrer to the petition was sustained, and, as the plaintiff elected to stand on the ruling, judgment of dismissal was entered. The plaintiff appeals.—*Affirmed*.

Wilson & Albert, for appellant.

Howard & Howard, for appellees.

LADD, J.—John Boyle died May 16, 1902, and Catherine, his widow, was appointed administratrix of his estate

three days later. Notice of her appointment was first published on the 22d of the same month. No claim having been presented or filed, she was discharged on the 10th day of June, 1903; those interested having consented thereto. On the 4th day of August following, the plaintiff, Charles A. Bole, by his next friend, filed his petition, alleging the foregoing facts, and asserting his minority and the want of notice as peculiar circumstances entitling him to equitable relief from the bar otherwise interposed by section 3349 of the Code, requiring claims against an estate to be filed within twelve months after the first publication of the notice of the administrator's appointment. No exception is made in favor of a creditor laboring under disability, and, in the absence thereof, courts generally hold that none exists. *Morgan v. Hamlet*, 113 U. S. Rep. 449 (5 L. Ed. 583, 28 L. Ed. 1043); *Baker v. Bean*, 74 Me. 17; *Foster v. Maxey's Ex'rs*, 6 Yerg. 224; *Smith v. Smithson*, 48 Ark. 261 (3 S. W. Rep. 49); *Cone v. Dunham*, 59 Conn. 145 (20 Atl. Rep. 311, 8 L. R. A. 647); *Cochran v. Young*, 104 Pa. 333; 8 Am. & Eng. Enc. of Law (2d Ed.) 1079. As was observed by Mr. Justice Miller in *Vance v. Vance*, 108 U. S. Rep. 514 (2 Sup. Ct. 854, 27 L. Ed. 808): "The exemptions from the operation of the statutes of limitation usually accorded infants and married women do not rest upon any general doctrine of the law that they cannot be subject to their action, but in every instance upon the express language in those statutes giving them time after their majority." To hold that the fact of minority is a peculiar circumstance, such as contemplated, would be equivalent to ingrafting an exception on the statute, extending the time within which creditors who are minors may file claims during their minority, and thereby defeat the manifest intention of the Legislature in enacting the statute, which was to secure the speedy settlement of estates, and the repose of titles derived from the dead. The excuse now urged a few months after the expiration of the statutory period would be equally available

for another at any time before attaining majority, and estates, instead of being promptly settled, would be open to attack for nearly twenty-one years. This was doubtless the reason which led to the omission of any exception in favor of creditors laboring under disability, and we have no notion of undertaking to defeat the legislative purpose by reading this exception, under the guise of a peculiar circumstance entitling to equitable relief, into the statute. Notice of the administrator's application for discharge to a creditor whose claim had not been filed was not required. *Potter v. Brentlinger*, 117 Iowa, 536.— *Affirmed*.

C. H. DEWITT v. MILLS COUNTY, Appellant.

Contagious disease: EMPLOYMENT OF PHYSICIAN. A board of health of a special charter city may, in an emergency, legally contract with a member of the city council and also the health officer of the city to attend persons who are a county charge afflicted with a contagious disease.

Appeal from Mills District Court.—HON. W. R. GREEN,
Judge.

SATURDAY, DECEMBER 17, 1904.

ACTION to recover for medical services rendered under a contract with the board of health of Glenwood. A directed verdict was returned, upon which judgment was entered as prayed. The defendant appeals.— *Affirmed*.

L. T. Genung and A. E. Cook, for appellant.

John Y. Stone, for appellee.

LADD, J.— In December, 1901, an epidemic of small-pox broke out in the city of Glenwood, and the plaintiff was

employed to render all necessary medical services to those afflicted with the disease on the following terms: For the first case he was to receive \$150; for the next three, \$100 each; and thereafter \$50 for each patient. Four patients were treated. Payment has been made for the first. The other three were persons for whose care the county was liable. Some question is raised concerning the liability of two of these, but the evidence showed conclusively that they were without means. That part of the answer alleging that at the time of entering into the contract the plaintiff was a member of the city council of Glenwood, and also health officer of its board of health, was stricken, on motion, as being immaterial and irrelevant. The ruling was correct. Glenwood is a city under special charter, and the board of health consisted of five members designated by the mayor. The plaintiff was not one of these, and there is nothing in the statutes prohibiting him, in an emergency, from being employed by the board of health at an agreed compensation. Section 1026, Code. This was not subject to the approval of the council, and the contract was not invalidated by section 943 of the Code, prohibiting any member of the council from becoming "interested directly or indirectly in any contract for work or service to be performed for the corporation." The corporation referred to is the city, and, as the service was not to be rendered for it, but at the expense of the county, the statute does not apply.—*Affirmed.*

ALBERT PIETER, Appellant, v. J. H. BALES, MARY C. LIGHTFIELD, JOHN LIGHTFIELD, and C. W. LIGHTFIELD.

Fraudulent conveyances: UNLAWFUL COMBINATION: EVIDENCE. In an action for damages based on the contention that defendants entered into an unlawful combination to hinder and delay plaintiff in the collection of a judgment against another, the evidence is considered and held insufficient to show a fraudulent concealment of the judgment debtor's property.

Appeal from Hardin District Court.—HON. J. H. RICHARD, Judge.

SATURDAY, DECEMBER 17, 1904.

ACTION to recover damages for conspiracy to cheat and defraud the plaintiff by combining with one Herman Lightfield to hinder and delay the collection of a judgment recovered by plaintiff against said Herman Lightfield, by covering up, concealing, and placing out of the reach of an execution the property of said Herman Lightfield, who had become insolvent. On issue joined, trial was had to a jury; and at the close of the evidence the court dismissed plaintiff's action as against J. H. Bales, Mary C. Lightfield, and John Lightfield, and a verdict was returned and judgment entered against C. W. Lightfield in plaintiff's favor. From the judgment dismissing plaintiff's action as to the three defendants named, plaintiff appeals.—*Affirmed.*

F. H. Noble and J. H. Scales, for appellant.

Albrook & Lundy, for appellees.

McCLAIN, J.—There was absolutely no evidence, so far as the record shows, of a combination participated in by the three defendants, as to whom plaintiff's action was dismissed, to in any way delay or defraud plaintiff in the enforcement of his judgment against Herman Lightfield; but counsel for appellant insist that under the allegations plaintiff was entitled to recover against the defendants separately for any wrongful act in assisting Herman Lightfield to put his property out of his hands to prevent the enforcement of plaintiff's judgment. Conceding this to be true for the purposes of this case, we find the facts, as shown without dispute in the record, to be that, during the pendency of the

original action by plaintiff against Herman Lightfield, the latter executed to the defendant J. H. Bales a written obligation for the repayment of \$1,500, borrowed money advanced or to be advanced to his attorneys, from which should be paid certain indebtedness, and the balance used for paying the expenses of the pending litigation, with a mortgage on certain real property to secure the same, which real property, it appears, was already incumbered. Bales was a banker, and we discover no evidence indicating that he had any fraudulent purpose in loaning this money to Herman Lightfield. It may be that it was somewhat unusual to advance money on a second mortgage, which, with the previous incumbrance, almost, if not quite, equaled the value of the property mortgaged, which was substantially the entire property of the borrower; but if he saw fit to lend \$1,500, substantially without other security than the personal obligation of the borrower, we cannot say that his purpose was necessarily fraudulent, and there are no other circumstances in the transaction tending to indicate fraud. The fact that plaintiff was then prosecuting an action against Herman Lightfield to recover a considerable amount by way of damages would not deprive the defendant in such action of the right to borrow money to pay off his existing debts and carry on the pending litigation.

As to Mary C. Lightfield, the wife of Herman, the evidence shows that, on the same day on which the mortgage was given to Bales, her husband executed to her a bill of sale of substantially all of his personal property, consisting of live stock, oats, and hay, in consideration of an alleged previous indebtedness of the husband to the wife for money advanced by the wife to the husband and personal property previously delivered to him. The advancement of money was evidenced by notes which were surrendered when the bill of sale was executed, and there is no evidence impeaching the testimony of the wife that the personal property had been turned over by her to her husband on their marriage.

The wife was also, according to her testimony, to pay certain indebtedness of the husband, which she testifies she paid as agreed, and we find nothing to impeach her testimony. If she testifies truthfully, there was a full and adequate consideration on her part for the bill of sale given her by her husband.

As to defendant John Lightfield, father of Herman, there is no claim of wrongdoing, except that he received, out of the money borrowed from Bales, payment of an indebtedness due to him by his son, with knowledge at the time that the action of plaintiff was pending against his son; but this fact alone would certainly not constitute an actionable wrong so far as plaintiff was concerned. Even if plaintiff had already secured a judgment against Herman Lightfield, there would be no actionable fraud on the part of his creditors, even though they were his relatives and had knowledge of the judgment, in accepting out of his available resources payment of their claims, though the effect of such payment would be to leave insufficient resources in the hands of the judgment debtor to enable him to satisfy plaintiff's judgment. The acceptance of payment of a debt from an insolvent debtor is not in itself a fraud on other creditors.

It may be that plaintiff was unfortunate in being compelled to rely entirely on the testimony of the defendants for the purpose of establishing his case. However this may be, in the absence of any evidence of facts or circumstances constituting fraudulent conduct on the part of the defendants, plaintiff was not entitled to recover, and his action as against the three defendants named, who are appellees, was properly dismissed.

The judgment of the trial court, so far as it is attacked on this appeal, is therefore *affirmed*.

WEAVER, J., takes no part.

IN RE ESTATE OF W. F. DONALDSON, Deceased.

Insurance: RIGHTS OF CREDITORS WHEN PAYABLE TO ESTATE. To render the proceeds of a life insurance policy payable to the estate of deceased liable for the satisfaction of a specific claim against the estate, there must have been an assignment of the fund or a definite portion thereof for that purpose, so that deceased parted with all control thereover. Evidence held insufficient to constitute such assignment.

Appeal from Audubon District Court.—HON. A. B. THORNELL, Judge.

SATURDAY, DECEMBER 17, 1904.

THIS is a proceeding by one Kate F. Hamilton to establish a claim on a note held by her against the estate of W. F. Donaldson, deceased, and for an order directing the administrator to pay the same out of the proceeds of a certain life insurance policy issued to the deceased and payable to his estate. The trial court allowed the claim, but denied the order. Claimant appeals.—*Affirmed.*

V. E. Horton and *H. U. Funk*, for appellant.

Myers & Blume, for appellees.

DEEMER, C. J.—On August 1, 1895, the deceased executed a note for the sum of \$740.80 to the claimant, due August 1, 1896. It is alleged that this note was for money borrowed by the maker thereof, who at the time orally agreed with the payee that he would take out a policy of life insurance, payable to his estate, in order that the proceeds thereof should be for the benefit and security of his creditors, and especially for the benefit and security of the claimant herein to whatever amount might be due and owing

her at the time of the maker's decease. The administrator denied the alleged agreement, and pleaded usury in the note. The widow of the deceased in her own behalf, and as guardian of a minor child, filed a petition of intervention, in which she claimed the proceeds of the life insurance as exempt from the debts of her husband, and denied the agreement pleaded by the claimant. The case was tried upon a stipulation, some testimony introduced by the claimant in the form of a deposition, and certain other oral testimony delivered from the witness stand. The trial court found that interveners were entitled to the insurance money, and claimant appeals.

There is no doubt that claimant loaned the deceased some money in December of the year 1894, and that deceased executed the note, which was filed with the administrator as evidence thereof. This note was filed with the administrator, and he allowed the same to the extent of \$1,100. As neither he nor the widow or heir make any question regarding this allowance, that feature is out of the case.

May 22, 1895, the deceased took out a policy of life insurance in the Bankers' Life Insurance Company of Des Moines in the sum of \$2,000, payable to his estate. At the time of borrowing the money, the execution of the note and the taking out of the policy, deceased was an unmarried man. Afterwards, and on January 8, 1896, he married, and had one child by this woman before his death. Some time after his marriage he took out another policy of insurance in the sum of \$1,000, making his then wife the beneficiary therein. Donaldson died in November of the year 1900, and one Bilharz was appointed administrator of his estate. This administrator collected from the Bankers' Life Insurance Company the sum of \$2,025 on the policy issued by it, and held the proceeds at the time this action was commenced. The deceased owned no real estate, and had but \$25 in personal property, aside from the proceeds of the life insurance.

The controversy in the case is largely over the facts, although appellees insist that, even if an agreement such as is claimed is shown, it is too indefinite to justify a court in finding that there was any pledge or equitable assignment of the policy or of the proceeds thereof to the claimant. It is further argued that such an agreement, if made, is invalid, for the reason that it had relation to property to be acquired in the future, and therefore cannot be enforced.

The evidence shows that in December of the year 1894 the claimant, who is a sister-in-law of the deceased, borrowed of an agent of a loan and trust company something like \$700, giving a mortgage upon her land as security therefor. This money she turned over to the deceased, loaning it to him that he might engage in a mercantile venture. It was also agreed between the parties that, to make sure of the return of the money if the debt was not paid before the death of the borrower, he would take out a policy of insurance on his life in the sum of \$1,000. The exact words, according to the witness, were: "He promised his sister Kate, at the time the seven hundred dollars was paid over to him, that he would take out a policy of life insurance in the sum of \$1,000, so that, if anything should happen before he had repaid the money loaned, she would be sure of receiving it." After this conversation, deceased stated to the same witness that he had taken out the life insurance policy he had promised his sister at the time she loaned him the money.

Under our statutes the avails of any life insurance are not subject to the debts of the deceased, except by special contract or arrangement, and shall be disposed of like other property left by the deceased. Code, section 3313. So that, unless a special contract or arrangement with the deceased for the payment of the avails to his creditor be shown, the widow and heirs at law are entitled thereto, exempt from the debts of the deceased. This contract or arrangement requires a meeting of the minds of the parties, and all the essentials of a valid and enforceable contract. *Larrabee v. Pal-*

mer, 101 Iowa, 132. We have to inquire, then, whether any valid and enforceable contract was made between claimant and the deceased, and, if so, the nature of that contract.

According to the testimony, deceased was to take out an \$1,000 policy of life insurance, so that, if anything happened before he had repaid the money, claimant would be sure of receiving it. He did not take out an \$1,000 policy, but a \$2,000 one; and the only evidence that this was in performance of his alleged contract is that he said at one time that he had taken out the policy he had promised his sister he would at the time she loaned him the money. The policy taken out is not the exact one promised, and by inference, only, may we say that this policy was the one intended when the money was loaned. The \$1,000 policy which he did take out was made payable to his wife as beneficiary.

Another significant fact is that the note in suit, which is the basis of the claim, was not made until August, 1895, some three months after the \$2,000 policy of life insurance was issued, and nothing was said in this note about the policy, nor was any assignment of the policy made or requested.

The truth, as we apprehend it about this controversy, is this: Deceased, when he borrowed the money of his sister, was an unmarried man. It was supposed that, if he took out a life insurance policy payable to his estate, the avails thereof, in case of death, could be reached by his creditors; and he promised to take out a policy in the sum of \$1,000, not as security for the loan, as plaintiff alleges, but to the end that, if anything happened before he had repaid the money, claimant would be sure of receiving it. No assignment was spoken of, no thought of a lien suggested; simply a promise to take out a policy of insurance in a certain amount, in the belief that, if he died before paying his sister, she might get her pay from the avails of his life insurance. This is something entirely different from a special contract

or arrangement to pay the specific debt from the avails of a life insurance policy. At most, there was nothing but an equitable assignment of a part of the policy or the proceeds thereof, and in such cases there must in fact be an assignment, oral or written, of the fund, or some definite proportion thereof — such an agreement as that the assignor parts with all control thereover. *Foss v. Cobler*, 105 Iowa, 728; *Fairbanks v. Welshans*, 55 Neb. 574 (75 N. W. Rep. 865); *Mally v. Mally*, 121 Iowa, 237. There was no apportionment here of any part of the fund; and a mere agreement to pay out of a part of a particular fund is not sufficient, according to the weight of authority, to constitute an equitable assignment. *Bank v. Sproat*, 55 Minn. 14 (56 N. W. Rep. 254); *Dirimple v. State Bank*, 91 Wis. 601 (65 N. W. Rep. 501).

We are constrained to hold that no such special contract or arrangement between the debtor and his creditor with reference to the policy of insurance or its avails is shown as to justify a court in awarding any part of the funds in the hands of the administrator to the payment of the claimant's demand. As said in *Herriman v. McKee*, 49 Iowa, 185, the testimony to establish such an agreement as is here claimed must be clear and satisfactory. In that case, as in this, there was testimony that the insured intended to pay the note out of the avails of a life insurance policy; but this was held insufficient. There, as here, a note and contract were executed, but nothing was said therein about the policy of insurance. It was also held in that case that the testimony must be such as to prove a contract, and, under the circumstances, with clearness and explicitness. That case really rules this one, for the evidence here is no stronger than in that case. The testimony convinces us, as it did the trial court, that the deceased promised to take out a life insurance policy payable to his estate in the belief that, if he died, the avails thereof could be used for the payment of his debts. He made no special contract or agreement that it should be

so used, but both parties relied upon a mistaken view of the law. At any rate, they made no enforceable contract of assignment or pledge.

The decree and order of the trial court are correct, and the judgment is *affirmed*.

M. A. CLINTON, Appellant, v. T. J. SHUGART & C. G. OUREN, Appellees.

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| 126 | 179 |
| 138 | 650 |
| 126 | 179 |
| 143 | 100 |

T. J. SHUGART & C. G. OUREN, Appellees, v. M. A. CLINTON, Appellant.

Executory contract for sale of land: LIABILITY FOR ACCRUING TAXES.

- 1 As between the parties to an executory contract for the sale of land, where the vendor retains the possession, rents and profits until the conveyance is due, he is liable for the payment of accruing taxes in the absence of an agreement by which the purchaser assumes that obligation: and this rule is not affected by Code, section 1400.

Sale of real property: EXECUTORY CONTRACT: CONSTRUCTION.

- 2 The provisions of an executory contract for the sale of land are considered, and it is held that there is nothing to indicate an understanding of the parties that the purchaser should pay the taxes falling due prior to a conveyance of the title.

Specific performance: TENDER.

- 3 Where it is the duty of the vendor in an executory contract to convey land to pay the taxes accruing up to the time of the conveyance and he fails so to do, a tender of the purchase price at the maturity of the contract, less the amount of such tax, will support an action for specific performance at the suit of the vendee.

Actions: EQUITABLE RELIEF.

- 4 Where a suit in equity, by a vendee of real property, for specific performance and one at law to rescind the contract are pending at the same time, the court may proceed to determine the material issues in the equity suit regardless of which action was begun first.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge.

SATURDAY, DECEMBER 17, 1904.

THE appellant, who is a resident of Minnesota, being the owner of certain property in the city of Council Bluffs, Iowa, leased the same to the appellees under date of August 10, 1899, for a period expiring January 1, 1903, at a rental of \$600 per annum. On July 3, 1901, the parties entered into a written agreement for the sale and purchase of the property for the sum of \$500 in hand paid, and the further sum of \$6,500, payable on or before January 2, 1903, without interest; appellees to continue to pay rent under the lease until the expiration of the term, unless the purchase price should be sooner paid. After making this contract, and before the time for the making of the conveyance had matured, general taxes for city, county, and State purposes were levied upon the property for the years 1901 and 1902, and remained delinquent and unpaid. On the day the contract matured the appellees made tender to the authorized agent of the appellant of the entire unpaid portion of the contract price, less the amount of the tax, and offered to pay the full \$6,500 if appellant or her agent would remove the lien. Relying upon the theory that appellant was not bound to pay the taxes accruing after the date of the contract, the agent refused to accept the tender or to discharge the lien. On the same day the appellees filed in the office of the clerk of the district court their petition in equity against the appellant, asking a specific performance of the contract to convey. Thereafter service of the original notice of such action was served by publication. On January 29, 1903, the appellant, acting upon a forfeiture clause in the contract, served notice on the appellees that, unless payment of the agreed purchase price of the property was made within thirty days, the contract would be declared forfeited, and possession demanded. On March 10, 1903, and before publication of the original notice was completed in the action begun

by the appellees, appellant began her action at law in the district court to recover possession of the property. On trial to the court in each case the issues were found with the appellees, and appellant was decreed to make the conveyance as prayed in the action for specific performance. Mrs. Clinton, defendant in the action in equity and plaintiff in the action at law, appeals. As both actions turn upon the same state of facts, they have been jointly submitted in this court, and will be disposed of in one opinion.—*Affirmed.*

E. E. Aylesworth, J. R. Reed, and Francis B. Hart,
for appellant.

Harl & Tinley, for appellees.

WEAVER, J.—When the statement of facts is comprehended, it will be apparent that the principal question presented for decision is a narrow one—on which party did the duty rest to pay the taxes accruing upon the property after the making of the contract and before the conveyance was due? That part of the contract upon the construction of which this inquiry principally turns is in the following words; appellant being referred to therein as “party of the first part” and the appellees as “parties of the second part”:

And the said second party, in consideration of the premises, hereby agrees and promises to pay to the said first party, the sum of SIX THOUSAND FIVE HUNDRED (\$6,500.00) Dollars, according to the tenor and effect of his ~~promissory notes described as follows:~~ THIS CONTRACT, ON OR BEFORE THE 2ND DAY OF JANUARY, 1903, IT BEING UNDERSTOOD THAT THE PRESENT LEASE SHALL REMAIN IN FORCE UNTIL SAID 2ND DAY OF JANUARY, 1903, at the OPTION OF PARTIES OF SECOND PART, WHO ARE TO CONTINUE PAYING THE RENT THEREUNDER UNTIL SAME TERMINATES OR PARTIES OF SECOND PART MAY ELECT AT ANY TIME HEREAFTER TO PAY SAID BALANCE OF \$6,500.00 TO PARTIES OF FIRST PART, THEREBY TERMINATING SAID LEASE AND BECOMING ENTITLED

~~TO DEED HEREUNDER bearing even date herewith and payable to the order of the said _____ with interest thereon from _____ at the rate of _____ per cent per annum, payable _____ annually. The said second party also agrees regularly and seasonably, to pay all taxes and assessments, that may be hereafter lawfully imposed on said land, before the same shall become delinquent, including the taxes for the year 1890.~~

Now, in case the said second party shall pay the said several sums of money punctually, in accordance with the tenor and effect of the CONTRACT, said promissory notes and shall strictly and literally perform all his agreements and stipulations herein contained in accordance with their true intent and meaning, then the first party, upon the surrender of this contract, will execute unto the said second party a WARRANTY deed, conveying to him the above described real estate in fee simple, with covenants that at the date of this agreement the title of the said first party was perfect in and to the same, and that he will forever WARRANT AND DEFEND the title against the lawful claims of all persons whomsoever, up to the date hereof, and with special covenants against his own acts up to the time of executing said deed, SUBJECT TO THE UNPAID INSTALLMENTS OF PAVING TAX MATURING AFTER THE DATE OF THE DEED HEREIN PROVIDED FOR. But in case the said second party shall fail to make the payments aforesaid, or any of them punctually, and upon the strict terms and the exact time herein limited, or shall fail to perform all and each of the agreements and stipulations herein contained, strictly or literally, without any default or neglect, the time for payment being expressly understood to be of the essence of this contract, then the said first party shall have the right to declare this agreement null and void, and all rights and interests hereby created or then existing in favor of said second party, or in any manner derived under this contract, shall utterly cease and determine, and the said real estate shall revert to and revest in the said first party, without any declaration of forfeiture, act of re-entry or any other act to be by said first party performed, as absolutely, fully and completely as if this agreement had never been made, and without any right of the said second party of reclamations or compensations, for money paid or improvements made.

(This contract was written upon a printed form. In the portion above quoted the erased lines represent like erasures in the original, the unerased printed matter is here copied in ordinary type, while the written portion appears in CAPITAL LETTERS.)

We have examined this agreement with much care in the light of the arguments of counsel and of the precedents cited, and conclude that the obligation to pay the taxes rested upon

the appellant. The contract was not one by which the appellees obtained any present right to the use or possession of the property. They

1. LIABILITY FOR ACCRUING TAXES. were in possession under a lease, and remained in possession until January 1, 1903, in their rights as tenants alone. In other words, the appellant was, in a legal sense, herself in possession by her tenants, and she was receiving the agreed rental therefor. Until the time should arrive for a deed, the appellees, except as tenants, had no more right in or control over the premises than they would have obtained by a similar contract pending the term of a lease held by a stranger. We think it an established rule of law in this State that, as between the parties to an executory contract for the sale of land, where the seller retains the possession, rents, and profits until the conveyance is due, the duty rests upon him to pay the accruing taxes, in the absence of any agreement by which the purchaser assumes that obligation. This principle was expressly recognized in *Miller v. Corey*, 15 Iowa, 166; *Hunt v. Rowland*, 22 Iowa, 55; *Lille v. Case*, 54 Iowa, 182; *Nungesser v. Hart*, 122 Iowa, 647. The last-cited case seems to be directly in point. Hart had sold plaintiff a tract of land by warranty deed, and the latter brought suit for a breach of the warranty because of a tax lien which had accrued after the contract of sale and before the conveyance. It appears that the contract, as in the present case, was purely executory and possession was not to be given until after the deed was made. Reversing the ruling

of the lower court sustaining a demurrer to the petition, we held the action could be maintained, and that the seller retaining the use and possession of the property was liable for all taxes accruing before the title passed. It is, we think, the universal rule that the holder of the legal title in the actual occupancy and possession is duly bound to pay the taxes accruing during such possession, and, in the absence of some agreement to the contrary, he cannot shift the burden to the shoulders of another. Warvelle, in his work on Vendors, section 179, says: "Primarily, the duty of paying the same [taxes] rests upon the person who holds the legal title. * * * The obligation is equally binding upon the vendee who has stipulated or agreed to pay the same. A vendee, prior to the conveyance, who has not so agreed, will not be directly responsible for the tax. * * * As between the parties, all payments of taxes by the vendee are presumed to be made on behalf of the vendor." The principle applied in *Nungesser v. Hart*, 122 Iowa, 647, has been approved in *Farber v. Purdy*, 69 Mo. 601, and we find no holding to the contrary in this State or elsewhere.

The enactment of Code, section 1400, fixing the date when a tax lien attaches between the seller and buyer of land, does not affect the authority of *Miller v. Corey* and other cases in which that decision is followed, for one who agrees to sell and convey at a future date, meanwhile remaining in possession of the property, continues to be the owner for the purposes of taxation until the contract is performed and the title passes, and it is this date to which we must look in applying the statute. According as the passing of the title takes place before or after the date named in the statute, will the duty of paying the taxes fall upon vendee or vendor. If, therefore, the contract before us contains no provision by which the appellees expressly or impliedly undertake the burden of the accruing taxes, we must hold it to have been appellant's duty to discharge them.

Counsel insist, however, that the provision in the con-

tract by which the appellant's deed was to warrant the title generally to the date of the contract, and thereafter only specially against her own acts, is a sufficient con-indication of the understanding of the parties that she was to be relieved from the payment of taxes; but this is a strained and unnatural interpretation of the language referred to. Appellees, as the holders of the contract of purchase, had an equitable right in the land, which was liable to become incumbered by their acts or omissions, thus creating real or apparent clouds or burdens upon the title; and it is not an unusual thing for vendors, in making an executory contract of sale, to fence against future annoyance and controversy by limiting the effect of their covenants in this manner. She does undertake to warrant against her own acts down to the making of the conveyance, and if, as we hold, it was her duty to pay the taxes, in the absence of an agreement to the contrary, and by her neglect and failure to perform that duty the title has become incumbered, we see no reason why it may not be said to be, in a very just sense of the word, the result of her own act, for which she would be liable on her covenant.

There are other significant facts in respect to the contract, which go to strengthen the conclusion we have reached. The blank form employed contained a printed clause, which expressly bound the purchasers to pay the taxes from the date of the contract; but these words were erased before its execution, and no equivalent expression is found elsewhere. It is incredible, if there was any agreement or understanding by which this obligation to the public was to be shifted from appellant to appellees, that this clear and express provision should have been carefully erased, and the alleged understanding left to remote and obscure inference. It is to be conceded that the erasure of this clause will not of itself authorize the court to place any other or different interpretation upon the words not erased than would be required if the erased part had never existed; but where the language

remaining is in any degree obscure, uncertain, or ambiguous, we may read it in the light of the circumstances surrounding its execution, and in the present case the erasure is a circumstance not to be overlooked.

Again, it will be noted that at the date of the agreement there had been assessed against the property a paving tax payable in yearly installments, yet to mature. To guard against being held liable for any part of this tax coming due after she had ceased to have the benefit of the occupation of the property, the contract provides that appellant's warranty shall be made "subject to the unpaid installments of the paving tax maturing *after the date of the deed herein provided for,*" thus impliedly recognizing that the conveyance of the title, and not the making of the preliminary contract, marked the date at which her duty to care for the tax liens should cease. There is nothing in the contract which can be fairly construed as an express assumption of the taxes by the appellees, nor do we find anything from which such an implication can arise. Our holding that, in the absence of any agreement to the contrary, the duty of paying the taxes rested upon the seller in possession of the property, operates to overcome all the objections urged in appellant's argument upon the general proposition; and, in order to escape that obligation, she must point to some stipulation in the writing by which appellees assumed it. This has not been done.

The further point made — that the money paid as rent after the date of the contract was in fact a part of the purchase price, and that from such date appellees held possession in their right as purchasers, and not as tenants — cannot be sustained. There is no suggestion in the terms of the contract itself that prior to January 2, 1903, or such earlier date as they might elect to pay the full contract price, appellees had any other or greater right to possess or control the use of the premises than they had already had by virtue of their lease. On the contrary, the continued existence of the lease as such is expressly recognized by the

stipulation that "the present lease shall remain in force until the 2d day of January, 1903, at the option of the parties of the second part, who are to continue paying rent thereunder until the same terminates," etc. Had the appellees failed to pay the rent as it accrued, we think there can be no reasonable doubt that the appellant would have availed herself of the remedy by landlord's attachment for its collection. So, also, if the appellees had paid or tendered in full the agreed purchase price of \$7,000, appellant could not have justified a refusal to convey simply because an installment of rent under the lease was overdue and unpaid. Save as to the right of appellees to demand and receive a deed upon the performance of the stipulated conditions precedent, the relation of the parties to the property, its possession and use remained wholly unchanged until January 2, 1903.

It is finally contended with much insistence that, even if it be conceded that appellant is bound to pay the taxes, appellees cannot be excused from tendering the full contract price, and failure to make a tender of such full payment within thirty days after the notice of forfeiture works an entire loss of all appellees' rights under the contract. In our judgment, there is no rule of law or equity which necessitates such an inequitable result. Appellant having undertaken to convey a clear title, it is repugnant to sound principle that she should be permitted to collect the full contract price upon tender of an incumbered title, especially when that incumbrance is for a definite, ascertainable sum, which can be readily adjusted by immediate payment by herself, or by conveyance subject to the tax, with proper abatement from the contract price. By insisting upon such removal of the lien by her, or compensation for its removal by themselves, the appellees ask nothing which she is not in good conscience bound to do, and they should not be compelled to part with their money for an incumbered title, and then be forced to resort to an inde-

3. SPECIFIC PERFORMANCE: tender.

pendent action at law upon the warranty, which course, by reason of appellant's nonresidence, or her possible insolvency, or vexatious resistance, may prove a wholly inadequate remedy. It is a settled rule or maxim that when equity has once obtained jurisdiction it will determine all questions material to the accomplishment of full and complete justice between the parties, and that in suits for specific performance the court will, as far as possible, put the parties in the condition in which they would have been had the contract been fully and completely performed by both according to its terms, although in so doing it may be required to pass upon matters cognizable at law. *Cathcart v. Robinson*, 30 U. S. Rep. 278 (8 L. Ed. 120); *Beal v. Chase*, 31 Mich. 535; *McDonald v. Davis*, 43 Ga. 356; *King v. Bardeau*, 6 Johns. Ch. 38 (10 Am. Dec. 312); *Wiswally v. McGowan*, 1 Hoff. Ch. 125; *Renkin v. Hill*, 49 Iowa, 270; *Green Bay Co. v. Miller*, 98 Iowa, 472.

Promptly on the very day when the deed was due from the appellant and its delivery had been demanded and refused, the appellees applied to a court of equity to enforce their rights in the premises, and by their petition not only pleaded the tender already made, but expressed their readiness, willingness, and ability to perform their agreement, and to pay whatever sum the court might adjudge to be due the appellant. This tender was broad enough to give the court cognizance of the entire controversy. It has often been held that in actions for specific performance, if the seller's title has failed as to a part of the property, or if it be found to be defective or incumbered, the purchaser may waive his right to repudiate the contract, and have performance enforced in his favor as far as the vendor is able to perform, with suitable and proportionate abatement from the contract price. *Townsend v. Blanchard*. 117 Iowa, 36, *Am. & Eng. Enc. Law*, volume 26, 176, note 7; *Jones v. Shackelford*, 5 Ky. 410; *Winne v. Reynolds*, 6 Paige, 407; *Sibert v. Kelly*, 22 Ky. 669; *Wintermute v. Carner*, 8 Wash.

585 (36 Pac. Rep. 490); *Brooks v. Isbell*, 22 Ark. 488; *Reece v. Holmes*, 5 Rich. Eq. 531; *Reese v. Hoeckel*, 58 Cal. 281; *Grant v. Beronio*, 97 Cal. 496 (32 Pac. Rep. 556); *Hunt v. Smith*, 139 Ill. 295 (28 N. E. Rep. 809). In the last-cited case it was held that in decreeing a specific contract for sale of land, the court, after giving the vendor an opportunity to remove a lien, and his failure to do so, may authorize the vendee to remove it, and reimburse himself out of his deferred payments on the land. Many other cases might be cited to the same substantial effect. The decree of the trial court was clearly within the rule of the authorities. The courts do not look with favor upon forfeitures, and when the party alleged to be in default appears on the date fixed by the contract, and tenders a performance which would be sufficient in equity, and upon its refusal promptly invokes the interposition and judgment of the court for a settlement of the dispute, offering to perform such judgment when entered, the court cannot be deprived of its right to take cognizance of the whole case and determine the entire controversy by any forfeiture clause in the contract, no matter how strict or stringent its terms.

Some question has been raised that the action at law was first in order of time, and that the rights of the parties should therefore be determined upon the issue joined in that case. Even if such priority in time (which is by no means clear) be conceded, we do not regard it as a circumstance of controlling importance. With both actions pending before it, we see no reason why the court, without regard to which was first begun, might not have proceeded to hear and dispose of every material feature of the controversy in the equity proceedings.

The conclusions we have announced are decisive of the appeal, and without further discussion the judgment of the district court is in each case *affirmed*.

4. ACTIONS:
equitable re-
lief.

DOROTHY J. FOSTER, Appellant, v. J. R. RICE, ET AL., and
the MASON CITY & FT. DODGE RAILWAY CO.

Homesteads: CONTINUATION OF RIGHT: EVIDENCE. Where a home-
1 stead was sold on foreclosure, and under a prior agreement a
sheriff's deed was executed to be held by the grantee as security
for the redemption of the property by the mortgagor, the equitable
title thus acquired did not create a new homestead right but a
continuation of the original right, and the property was exempt
from debts contracted subsequently to its original acquisition; and
parol evidence was admissible to show such agreement.

Homesteads: EXTENT OF SAME. The platting of a homestead for the
2 purposes of partition and taxation does not bring it within the
statutory provision limiting a homestead within a city or town
plat to one half an acre, although the same may be situated within
the corporate limits.

Appeal from Pottawattamie District Court.—HON. W. R.
GREEN, Judge.

SATURDAY, DECEMBER 17, 1904.

ACTION in equity to subject certain real property to the
payment of a judgment. The property was at one time the
homestead of defendants J. R. and Jennie L. Rice, and at
the time the action was brought had been sold to the defend-
ant railroad company, which retained in its hands a sufficient
amount of the purchase price to satisfy plaintiff's claim if it
should be established. After a hearing on the merits, a de-
cree was rendered dismissing plaintiff's petition, from which
she appeals.—*Affirmed.*

George W. Hewitt, for appellant.

Mayne & Hazelton, for appellees J. R. and J. L. Rice.

MCCLAINE, J.—Prior to the acquisition by plaintiff of the claim against defendant J. R. Rice, on which judgment in her favor was subsequently rendered, the defendants J. R. and J. L. Rice, husband and wife, owned and occupied as a homestead the premises in controversy, consisting of about three acres of land within the limits of the city of Council Bluffs, which was used for gardening and fruit growing. In 1893 the land was mortgaged to J. P. Hess, and in 1899, in pursuance of foreclosure proceedings, it was sold to Susan Hess in satisfaction of the mortgage. Through various assignments the certificate became the property of one Baily, with whom in 1901 J. R. Rice entered into a contract by which Baily agreed to convey the premises to Rice by warranty deed upon the payment of \$1,250.10, with interest, as evidenced by several notes, and on the following day a sheriff's deed was executed to Baily, the holder of the certificate. Subsequently the land was sold to the railroad company, and, as already stated, a portion of the proceeds, sufficient to satisfy plaintiff's judgment, if found to be a lien on the homestead, is in the hands of the railroad company for satisfaction of plaintiff's judgment, if the lien thereof as against the land is established. J. R. and J. L. Rice continued in possession of the premises as a homestead down to the time of the sale to the railroad company.

Appellant's claim is that the sheriff's deed to Baily extinguished the existing homestead right of the Rices, and that their occupancy from that time on, under the contract with Baily, was under a new homestead right, **1. HOMESTEADS:** which, originating after the indebtedness to plaintiff, was subject thereto. But the facts as established do not warrant any such conclusion. It is conceded that the original homestead right in the premises continued until the execution of the sheriff's deed, for up to that time the Rices had the right to redeem. By parol evidence it is established without question that, prior to the execution of the sheriff's deed to Baily, J. R. Rice entered

continuation
of right; evi-
dence.

into an agreement with him to allow him to take a sheriff's deed, on the condition, expressed in the written contract then entered into, that he should convey to Rice on payment of the indebtedness named. In fact, the indebtedness had been previously created, and the certificate had passed to Baily as security for this indebtedness, and the only effect of the arrangement by which he took the sheriff's deed was to substitute the deed for the certificate by way of security. At the time this arrangement was made, Rice had still the right to redeem, and we think it too plain for serious controversy that parol evidence was admissible to show this arrangement, and that the sheriff's deed in effect was a mortgage under which Baily held the legal title as security for the indebtedness of Rice to him. Rice might have redeemed if he had seen fit, and at once executed to Baily a warranty deed under such oral agreement as would render it in effect a mortgage; and we see no reason for excluding evidence which shows that the sheriff's deed, although executed directly to Baily, was executed to him under an arrangement by which he was to hold the legal title as mortgagee, subject to redemption by Rice by the payment of the indebtedness.

If the conveyance to Baily through the sheriff's deed was in effect a mortgage of the property by Rice to Baily, then Rice never lost the equitable title to the property, and continued to hold it as his homestead, not by reason of any new title acquired from Baily under the contract to convey, but in continuation of his previous homestead right. Therefore the plaintiff's claim did not antedate the acquisition of the homestead by the Rices, and plaintiff's judgment cannot be enforced against such homestead, nor the proceeds thereof in the hands of the railroad company. A homestead right may exist as to property held by an equitable title as effectually as though it were held by legal title. *Hewitt v. Rankin*. 41 Iowa, 35.

The case of *Wertz v. Merritt*, 74 Iowa, 683, is relied on for appellant in support of the claim that when Rice's title

was changed from a legal to an equitable title by the sheriff's deed to Baily, subject to the agreement to reconvey on payment of the indebtedness of Rice to Baily, the pre-existing homestead right was terminated and a new homestead right created. But the cases are not analogous. In that case the homestead had been held in a leasehold interest; afterwards the tenant acquired an undivided interest in the property as one of the heirs of the prior owner; and it is evident that there was no continuity between the right which existed in the tenant and that which accrued to the same person by inheritance. In this case, however, the title in Rice was continuous, although by the execution of the sheriff's deed to Baily, with the contemporaneous contract to convey to Rice, the title of Rice was changed from a legal to an equitable title. If the argument for appellant were sound, we should be required to hold that wherever the owner of a homestead executes a conveyance thereof, with a contemporaneous oral or written agreement which renders the conveyance in effect a mortgage, the existing homestead rights are lost and new homestead rights created. Certainly there is no warrant in any decision of this court, nor in reason, for such a conclusion.

It is contended that the Rices were entitled to hold only one-half acre exempt from execution, and that as the proceeds of sale of the entire tract would be amply sufficient to satisfy plaintiff's claim after the value of the homestead, if limited to one-half acre, were deducted, the exemption is fully satisfied, and plaintiff's claim may be enforced; but the statutory provision as to the extent of the homestead, which is now in force (Code, section 2978, as amended by Act Twenty-eighth General Assembly, page 89, chapter 119), and that which was in force when plaintiff's claim accrued (Code 1873, section 1996), alike limit the homestead to one-half acre only when within a city or town plat; and it appears that, while the three-acre tract in which the homestead was claimed was

2. HOMESTEADS:
extent of
same.

within the corporate limits of the city of Council Bluffs, it has never been within the platted portion of the city. It is true that this three acres is a portion of a larger tract which was at one time platted for the purpose of partition among heirs, and, as thus partitioned, was platted by the county auditor for the purpose of taxation; but the plat made by the auditor did not constitute such a plat as to bring it within the city or town plat. See Code, sections 914, 915, 922, 923; *Parrott v. Thiel*, 117 Iowa, 392. Therefore the homestead was not limited to one-half acre, but included the entire tract, irrespective of its value.

The judgment is *affirmed*.

R. C. KOOLBECK, Appellee, v. H. BAUGHN, Appellant.

Party walls: CHIMNEY FLUES: INJUNCTION. Where a party wall is erected without request by an adjoining owner for flues or joist bearings, as provided in Code, section 2998, and chimney flues are constructed therein by the owner for his own use, a sale of an undivided one half interest in the wall, simply, without reference to the flues, will not entitle the adjoining owner to use the same in a manner detrimental to his co-owner.

Appeal from Shelby District Court.—HON. N. W. MACY, Judge.

SATURDAY, DECEMBER 17, 1904.

SUIT in equity to restrain the defendant from using chimney flues built by the plaintiff in a wall in common. There was a judgment for the plaintiff enjoining the defendant from using the flues in a manner detrimental to the plaintiff's use thereof, and permitting him to enlarge two of the flues. The defendant appeals.—*Affirmed*.

Cullison & Robinson, for appellant.

Byers, Lockwood & Byers, for appellee.

SHERWIN, J.—The plaintiff and the defendant's grantor were the owners of adjoining vacant lots. The plaintiff built upon her lot, and placed one-half of the 12-inch brick wall upon the lot of her neighbor. She built into this wall, for her own sole use, and without consultation relative thereto with the then owner of the adjoining lot, four chimney flues, each of which occupied two inches of the wall resting upon the adjoining lot. The outside of this wall was solid, the adjoining owner having made no request for flues or for bearings for joists or beams, as provided by section 2998 of the Code. The defendant afterwards bought the adjoining lot, and erected thereon a building, using the wall in question as a wall in common, under the following written instrument: "Know all men by these presents: that I, R. C. Koolbeck, and John Koolbeck, her husband, of Shelby county and State of Iowa, in consideration of \$345.00 in hand paid by Harmon Baughn, do hereby sell and convey unto the said Harmon Baughn the following described personal property in the county of Shelby, State of Iowa, to-wit: An undivided half of the north wall of the two story brick building located on lot 11 of Kinsey's subdivision of lots 5, 6, 7 and 8, in block 45 of Long's addition to the town of Harlan, Iowa." After the completion of his building the defendant opened ways into the chimney flues built by the plaintiff, and now insists that he is entitled to the use thereof under his contract of purchase. We do not agree with this contention, however. The right of the plaintiff to build the wall upon the lot adjoining her property, and the right of the defendant to make it a wall in common by paying one-half of the value thereof, were both acquired by virtue of the statute, and it is evident that all parties hereto were proceeding thereunder. It is therefore clear that the writing

upon which the appellant relies as giving him greater rights in the wall in common than the statute itself gives does not in fact do so, and that it only conveyed to him the interest in the wall which the statute declared he was entitled to as an adjoining owner upon whose land it in fact rested. If this be true, we must determine the rights of the parties under the statute alone. The owner who desires to build is given the absolute right to place a part of his wall upon the vacant adjoining land, and, aside from the implied requirement of the statute that the wall shall be sufficient to support another building like his own, and the direct provision thereof that there shall be no openings therein on his neighbor's side unless at his request, he may build as he pleases. This is the unmistakable meaning and intent of the statute, for it is optional at all times with the adjoining owner whether he will make the wall one in common or not; and, if he does not see fit so to do, it in no manner changes or abridges the right of the owner who has built. Section 2998 defines in part the rights of a co-proprietor who builds against a wall held in common, and declares that upon the request of such co-proprietor the person building the wall shall make the necessary flues, etc. The flues are for the use and benefit of such co-proprietor, and, if he fails to request them, it is manifest that he cannot complain, or insist upon using those which the builder of the wall may provide for his own use. If this be true as to co-proprietors, it certainly must follow that one who is not a co-proprietor of the wall at the time it is built can have no greater rights; and where, as in this case, no request was made for such flues, we are of opinion that the subsequent builder is not entitled to the use of the flues built only for the convenience and use of the other, unless it clearly appears that such use will in no way be detrimental to the other's use thereof. Code, section 3001; *Batt v. Kelly*, 78 N. Y. (Supp.) 142.

The judgment is *affirmed*.

EDWIN OSTENSON, Appellee, v. O. R. SEVERSON, Appellant.

Depositions: WRITTEN EXCEPTIONS. An objection to a deposition because of the insufficiency of the notice should be overruled where no exceptions were filed as required by Code, section 4712.

Deeds: TRUSTS: PAROL EVIDENCE. A deed absolute on its face and reciting a consideration cannot, in the absence of fraud, be shown by parol to be in trust for the grantor.

Vendor's Lien. A grantor claiming that his conveyance was voluntary and without any agreement with the grantee, cannot have a vendor's lien for the price.

Appeal from Winnesheik District Court.—HON. A. N. HOBSON, Judge.

SATURDAY, DECEMBER 17, 1904.

THE plaintiff is an heir of Emily Severson, who died intestate, holding the legal title to the land in controversy, which, with other lands, was deeded to her by her husband, the defendant, O. R. Severson, several years before her death. This is a suit in equity to confirm the plaintiff's interest in the land, and for a partition thereof. The answer denies the delivery of the deed to the wife, and alleges that it was executed in trust for the husband, O. R. Severson, and was without consideration. There was a judgment confirming the plaintiff's interest in the land and ordering partition. The defendant appeals.—*Affirmed.*

E. P. Johnson, for appellant.

W. M. Strand and *Frank Sayre*, for appellee.

SHERWIN, J.—Upon the trial the defendant objected to the use of depositions taken within the State, because of the insufficiency of the notice. No exceptions to the depo-

sitions were filed as required by section 4712 of the Code, and the objections were therefore rightly overruled. *Pilmer v. Bank*, 16 Iowa, 321.

The deed from the defendant, O. R. Severson, to his wife is absolute in form, and recites a consideration of \$5,000 paid to the grantor. That an express trust cannot be proven by parol is well settled. *Gregory v. Bowsby*, 115 Iowa, 327; *Rogers v. McFarland*, 89 Iowa, 286. The conveyance was directly from Severson to his wife some years after he had purchased and acquired the title to the land, hence it is not a case for the application of the rule obtaining where a purchase is made and the price paid by one and the title passes to another. *Gregory v. Bowsby, supra*. The deed itself precludes parol proof of want of consideration for the purpose of establishing a resulting trust. It is absolute on its face, and, though there may not have been any consideration therefor, it recites one, and the presumption is conclusive, in the absence of fraud, that the grantee is to take the beneficial estate, and the recital cannot be contradicted by parol evidence of a different agreement. *Acker v. Priest*, 92 Iowa, 610; *Andrew v. Andrew*, 114 Iowa, 524; *Gregory v. Bowsby, supra*.

The defendant can have no vendor's lien for the purchase price, because under his own theory of the case there was never any agreement to pay anything therefor; in other words, his entire contention is that the conveyance was voluntary on his part, and without any sort of an agreement with his wife. The judgment is clearly right, and it is *affirmed*.

The appellee filed an amended abstract of some thirty pages, in which the questions and answers of the several witnesses are set out. This was unnecessary, and the appellant's motion to tax the cost thereof to the appellee is sustained to the extent of taxing him with four-fifths thereof. — *Affirmed*.

WILLIAM WATTERS, Appellee, v. CITY OF WATERLOO,
Appellant.

Defective sidewalks: ELECTION OF CAUSES. A plaintiff may plead as

- 1 many causes of action of the same general character as he may possess in separate counts, and is not required to elect under which he will proceed.

Proximate cause. Where plaintiff was injured from a fall due to an

- 2 alleged defective sidewalk and subsequently sustained other injuries from a fall on another street, due to the negligence of the city in failing to keep the walk clear of snow and ice, it is held that the relation of the alleged negligence of the city causing the first injury to the latter accident, was not such as to constitute the former the natural and proximate cause of the latter.

Appeal from Black Hawk District Court.—HON. A. S.
BLAIR, Judge.

SATURDAY, DECEMBER 17, 1904.

ACTION to recover damages for personal injuries. The petition filed was in two counts. In the first count the claim was made that on December 24, 1900, as plaintiff was passing over a sidewalk on Bridge street, one of the public streets in the defendant city, and in the exercise of due care, he was thrown to the ground by a defect negligently allowed by the city to exist in such sidewalk; that in falling his head struck violently upon the pavement, resulting in injuries to his head and brain, a shock to his nervous system, and an injury to the auditory nerves. In the same count the further allegation is made that subsequently, and about January 17, 1901, while plaintiff was returning home from work, his head became somewhat dizzy as a result of his fall in December, and, without fault on his own part, he fell upon the sidewalk on his face, striking upon his right eye, completely destroying his sight, making it necessary to have said eye removed, and

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causing great injury to his head, brain, and nervous system. In the second count, it was alleged that on and prior to January 17, 1901, the defendant city had negligently allowed ice and snow to accumulate on the sidewalk on Chestnut street in said city, which ice and snow by thawing and freezing had become irregular and rough of formation, with many sharp projections, making passage over same both difficult and dangerous. It is then alleged that, on the day named, plaintiff, while passing over said walk, and in the exercise of due care, slipped on the icy surface and fell, striking his right eye upon the rough and irregular formation, completely destroying the sight thereof, and that he was otherwise injured in his head, brain, and nervous system. Upon coming in, the defendant moved the court that plaintiff be required to elect upon which count of his petition he would proceed, and this for the reason that such counts were inconsistent with each other. The motion was overruled, and thereupon the defendant answered, denying generally. On the trial plaintiff introduced evidence relating to both accidents alleged. The defendant objected to all testimony as to the January accident as incompetent and immaterial, which objections were overruled. At the close of all the evidence the defendant moved for a directed verdict, one of the grounds of the motion being that no negligence on the part of the city had been shown in connection with the Chestnut street walk, and this motion was overruled. In submitting the case to the jury, the court by special instruction withdrew from consideration the second count, the reason therefor being stated "that the evidence fails to show knowledge on the part of the city of the condition of the walk, and plaintiff has failed in said count." The trial resulted in a verdict and judgment in favor of plaintiff, and the defendant appeals.—*Reversed.*

Miller & Williams, for appellant.

Reed & Tuthill, for appellee.

BISHOP, J.—Appellant complains of the ruling of the court upon its motion to require plaintiff to elect as between the counts of his petition. We think there was no error. A separate cause of action was pleaded in each count and certainly under our Practice Code a plaintiff may plead as many causes of action of the same general character as he may possess.

II. In the fourteenth paragraph of the charge the court told the jury, in substance, that if the plaintiff received an injury in December, 1900, as alleged, one of the effects of which was occasional spells of dizziness; and, further, if on January 17, 1901, while on his way home he became dizzy, and this was the result of his previous fall and injury, and because thereof he fell and sustained injury as alleged, and that he would not have so fallen but for such dizziness — then in law the last fall would be the result of the first fall, unless an adequate intervening cause for such last fall was found by the jury. In the fifteenth paragraph an intervening cause is defined as:

A cause which intervenes between a first and subsequent act which produced the last effect; but to relieve the wrongdoer from the effects of his first act which it is claimed caused the last result, the intervening cause must be an adequate one. The intervening cause, if any, in this case is that which caused the fall of plaintiff on Chestnut street, viz., the alleged unsafe condition of the walk at that place. You are instructed that if the condition of that walk on Chestnut street was such that it would probably have caused the fall of plaintiff while in the exercise of ordinary care himself, independent of the fact, if it be a fact, that plaintiff was dizzy at the time, then it would be an adequate intervening cause, and the injury at that place and time would not be the natural result of the fall of plaintiff on the 24th of December, in which case the defendant will not be liable for said last fall as the result of the first fall.

The giving of such instructions is assigned as error. And it is the contention of counsel for appellant that in no

event was there warrant for a finding that, as between the alleged negligence in December and the fall and injury in January, the relation was such as to give character to the former as the natural and proximate cause of the latter. This contention, we think, must be sustained. For the purposes of the present consideration, it may be assumed that the December fall was brought about by negligence on the part of the defendant city; that, as a direct result of such fall, plaintiff was subjected to occasional spells of dizziness; that he was suddenly seized with such a spell on the occasion of his January accident; and that while thus afflicted, and in attempting to save himself by sitting down, he slipped and fell, with the result as alleged by him. Such fact assumption, it will be observed, comprehends the entire case as related to the instructions of which complaint is made. Now, clearly enough, an approval of such instructions — and they may be considered together — would necessitate our reaching the conclusion, evidently reached by the trial court, that the facts warranted a finding to the effect that a direct and unbroken causal relationship existed between the alleged negligence of December and the accident of January, and that the result as complained of was one that ought reasonably to have been anticipated by the defendant. This we are unable to do. In the law of negligence it is fundamental doctrine that the injury and damage alleged must be shown to have been the natural and direct or proximate consequence of the wrongful act complained of, and the direct or proximate consequences of a wrongful act are those that immediately follow upon its commission. This is not to be taken as saying that the term “proximate” as used in this connection must be understood as meaning closeness or nearness in point of time, or in the physical sequence of events; it means closeness or nearness in point of causal relation. Watson on Personal Injuries, section 32. In general terms, it may be said to be the rule of the cases that the *causa proxima* is sufficiently established if the facts are so far con-

nected in orderly sequence as that it can be fairly said that, in the absence of the cause alleged, the injury and damage complained of would not have occurred. *Liming v. Railway*, 81 Iowa, 246; *McClain v. Gardon Grove*, 83 Iowa, 235; *Ward v. Railway*, 97 Iowa, 50; *Parmenter v. Marion*, 113 Iowa, 297. It follows as a matter of course that, when the line of causation has been broken by the intervention of some efficient, independent cause, such intervening cause must be accepted as the proximate cause, and in an action against the original wrongdoer the law will not undertake to further pursue the question or resulting damage. To avail the original wrongdoer as a defense, however, the intervening cause must be both independent and responsible of itself. To quote from a learned author: "The true conception is that the train of causes is not broken, so as to relieve the originator of the first cause from responsibility for the result, unless the independent cause which intervened was, of itself, sufficient to produce the result, in which case the law regards it, and not the antecedent cause, as the proximate cause." Thompson on Negligence, section 54 (2d Ed.).

In many of the cases it is stated — and we think the statement sound upon reason as well as authority — that the test of proximate cause is whether the injury and damage exhibited are such in character as that, in view of the cause originally set in motion, such injury and damage ought to have been anticipated as likely to occur. This, indeed, is but a reiteration of a principle which runs through the law of torts generally. One is held to a responsibility for the natural and probable consequences of his acts, because such are conclusively presumed to have been within his intention. He cannot be held to answer for results not within the probable, and hence, in the exercise of reasonable care, could not have been foreseen. That the particular injury complained of in a given case was unthought of by the wrongdoer, and hence not foreseen in point of fact, is, of course, immaterial. If within the probable, he cannot be heard to assert a want

of intention. *Doyle v. Railway*, 77 Iowa, 607; *Glanz v. Railway*, 119 Iowa, 611; *Christianson v. Railway*, 67 Minn. 94 (69 N. W. Rep. 640); *Hill v. Winsor*, 118 Mass. 251; *Railway v. Kellogg*, 94 U. S. 469 (24 L. Ed. 256). That it is not always easy to trace the line of causation must be apparent. It may be said, indeed, that the books are replete with cases which tend to confuse rather than to make clear. Manifestly the question is not one of science or of legal knowledge; it is to be determined in each case as a fact, and this in view of the attending circumstances of fact. *Railway v. Kellogg, supra*. And, invoking a familiar rule, where the circumstances are such that reasonable minds may reach different conclusions, the question is one for the jury; otherwise it is to be determined by the court. As each case will present fact conditions varying in greater or less degree from others, which have arisen, it follows of necessity that a determination in each must be made largely to rest upon its own facts.

Now, that it might have been foreseen that a personal injury such as was sustained by plaintiff in his fall in December would be followed by consequences more or less grave in character, is, of course, not open to question. Among these, naturally, would be pain and suffering, physical and mental; the impairment or loss of any of the functions of the body, and even insanity or death, might be expected as among the probable results. So, too, inherent in an injury thus sustained are the probable effects upon the future career of the person injured, such as the ability to attend to the duties, and to enjoy the comforts and pleasures of life, and, as well, the direct and unavoidable tendency, in view of the extent and character of his injury, to expose him to the outward annoyances and dangers of life. These, all being within the limits of probable expectation, are to be considered as direct or proximate results. / It is not to be understood, however, that a cause, proximate in itself, loses its character as such because in proceeding to a result naturally to be

expected therefrom — and which result is in fact complained of — it may be joined by other and independent or concurring causes, and thus aided in the accomplishment of such result. In all such cases, if the line of causation is not broken, the original wrongdoer will remain liable. *Liming v. Railway*, *supra*; *Gould v. Schermer*, 101 Iowa, 582; *Harvey v. Clarinda*, 111 Iowa, 528; *Osborne v. Van Dyke*, 113 Iowa, 557. Obviously, however, it is quite a different thing to say that a result having no direct causal relation with the negligent act complained of, but proceeding from a source wholly independent thereof, must be held to come into proximate relation with the original negligent act because aided in some way by one or more of the results flowing from such original act. This would be to indefinitely extend the boundaries of the field of reasonable expectation beyond the limits of the probable, and would be not only without warrant in reason, but against the clear weight of authority. In principle the following cases lend support to the conclusion reached by us: *Scheffer v. Railway*, 105 U. S. 249 (26 L. Ed. 1070); *Doggett v. Railway*, 78 N. C. 305; *Hargous v. Ablon*, 5 Hill. 474; *Shugart v. Egan*, 83 Ill. 56 (25 Am. Rep. 359); *Spaulding v. Winslow*, 74 Me. 528.

We are made aware that a holding, seemingly at variance with our conclusion, was reached by the Wisconsin court in the case of *Weiting v. Town*, 77 Wis. 523 (46 N. W. 879). In that case the negligence charged was a highway defect which had resulted in plaintiff's leg being broken. On the trial it was made to appear that subsequently a buggy in which plaintiff was riding was overturned, resulting in a rebreaking of his leg. The trial court charged the jury, in substance, that if the overturning of the buggy was without negligence, and it being found that the second breaking of plaintiff's leg would not have occurred but for the weakened condition thereof consequent upon the previous accident, the recovery might include the damages preceding directly from such sec-

ond breaking. The instruction thus given was approved, without any statement of reasons, or discussion of the principle involved, the court resting its holdings upon the authority of *Brown v. Railway*, 54 Wis. 342 (11 N. W. Rep. 356, 911, 41 Am. Rep. 41), and *Railway v. Kellogg*, 94 U. S. 475 (24 L. Ed. 256). In our view, the variance in the facts involved make it doubtful, to say the least, if any support for such holding can be found in the cases upon which it is based. But should we admit of soundness in the holding — and we do not — the case upon its facts is easily distinguishable from the case we have before us. Here the immediate, and hence the proximate, cause of the fall sustained by plaintiff in January, and from which the injury complained of proceeded, was his slipping upon the icy walk. At most, the dizziness consequent upon the December fall gave rise to a necessity for sitting down; it did not cause plaintiff to slip and fall, these being caused wholly by the condition of the walk. Moreover, the injury to plaintiff's eye, being the particular injury here complained of, was wholly unrelated to any injury sustained as the direct result of the December accident.

Without further extending this opinion, we conclude, for the reasons stated, that the giving of the instructions complained of was error. Other errors assigned are not likely to again arise. It follows that the judgment must be reversed, and the cause remanded for a new trial.—*Reversed.*

J. A. GALLAHER, Administrator, substituted plaintiff for
J. H. GALLAHER, Deceased, Appellant, v. HENRY GAR-
LAND, JR., Treasurer, ET AL., Appellees.

Street improvement: ABUTTING PROPERTY: VALIDITY OF ASSESSMENT.

- 1 Where a city has authority only to gravel a street at the expense of abutting property, and in connection therewith incurs and as-

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sesses against the property an expense for grading, which is unnecessary for the purpose of graveling and there is no way of separating such expense, the assessment is void *in toto*.

Same. Where the published notice of a street improvement does not
2 correspond with the ordinance and resolution, or the notice for proposals for bids does not cover the existing situation, an assessment of abutting property for the cost is void.

Assessment: WAIVER OF OBJECTION. A property owner who has no
3 knowledge that the cost of grading a street is to be assessed against his property does not waive objection thereto by failing to protest as the work goes on.

Same. Where an assessment is void, failure to object to the proceed-
4 ing before the city council will not preclude a suit to restrain collection thereof.

Tender. Where an assessment is void or where it does not appear
5 what portion of the same might have been legally assessed, a tender thereof is not required to maintain a suit to restrain the collection.

Appeal from Greene District Court.—HON. F. M. POWERS,
Judge.

SATURDAY, DECEMBER 17, 1904.

SUIT in equity to enjoin the sale of certain lots by defendant Garland, county treasurer, for the amount of assessments levied against them by the city council of the city of Jefferson for grading, graveling, and macadamizing streets in front thereof. The trial court dismissed the petition, and plaintiff, Gallaher, appealed. After the appeal was taken, plaintiff died, and his administrator has been substituted.
—*Reversed.*

Gallaher & Graham, for appellant,

Wilson & Albert, for appellees.

them, but, as one seems to be sufficient to sustain plaintiff's

DEEMER, C. J.—Many reasons are presented why the lots should not be sold to pay the assessments levied against

action, we shall consider but that one. The city council of the city of Jefferson passed a resolution for grading and graveling certain of its streets. Notice of a graveling resolution was given as provided by law, and the time and place fixed for the lodging of objections thereto. No objections having been filed, the proposition was finally adopted, and it was ordered that the expense of the improvement be taxed to the abutting property. Notice for bids for the graveling of the streets was thereupon given, and bids were received at the time fixed in the notice; and the contract for the work, including the grading of the streets, was awarded different contractors. The original contracts are before us, and they provide for the payment of an omnibus sum for doing the work of grading and graveling the streets. One was for the sum of \$177 and the other for \$350. Thereafter a resolution was passed to the effect that the cost of graveling and sub-grading be taxed to abutting property. Notice thereof was given, and a time fixed therein for those who were interested to appear and file objections. No one appearing, the cost of the entire work was assessed against abutting property according to lineal frontage. These taxes were certified to the county authorities as by law provided, and the county treasurer was about to sell plaintiff's lots, which abutted on the improved street, for the amount of the assessments levied against them, when this action was brought. It appears without controversy that not only the resolutions passed by the city, but the contracts made for the improvement, contemplated and provided for the grading or cutting down of the streets in some cases as much as fourteen inches, and in other places there was to be a substantial fill to bring the street to the established grade. This grading was much more than was necessary to make way for the graveling, and was done for the purpose of bringing the streets, when gravelled, to the established grade. Plaintiff's intestate did not appear before the city council, because he did not understand that the grading of the streets was to be included in the

improvement, and had no idea that an attempt would be made to charge him therewith, until after the work was completed. None of the published notices indicated that grading of the streets at the expense of abutting property owners was proposed. They all referred simply to the graveling of the streets. Plaintiff's intestate offered to pay his proportion of the expense of graveling the streets, and during the trial renewed his offer, but both were refused. He did not, as we have said, at any time appear before the council to object either to the improvement or to the assessment against his property.

The city had no authority to do any grading of its streets, except such as was necessary for the purpose of receiving the gravel, and to charge the expense thereof to abutting property owners, and in so far as it attempted to do so its action was void. Code, section 792; *Allen v. City of Davenport*, 107 Iowa, 90, and cases cited. However, its entire scheme contemplated a grading of the streets to bring them to the established grade, as well as graveling; and its proposal for bids, the bids themselves, and the final contracts, provided for the doing of this work. The bids were for a lump sum, as also were the contracts; and there is no certain way of telling how much of the contract prices was for subgrading and graveling, for which the abutting property might be charged, and how much for grading proper, which the city could do at its own expense only. Indeed, the contract for doing the work for which the city might lawfully charge abutting property was not let to the lowest bidder or bidders, as by statute required, and there is no way of telling how much may be legitimately taxed against abutting property. An attempt to do so by oral evidence was made, but it was, of course, a practical failure, and the assessments were not made on that basis. If there were any accurate method whereby to establish the cost of the improvement for which plaintiff's property might properly be assessed, there yet

1. ABUTTING
PROPERTY: va-
lidity of as-
sessment.

would remain several objections to the actions of the city council, which are fatal to the assessments. It had no power to make such omnibus contracts, and no right to include grading with the graveling of its streets in such a manner as that the graveling and necessary subgrading proposition could not be let to the lowest bidder therefor. If there were any way of divorcing the legal from the unauthorized acts of the council, we might perhaps sustain an assessment for the proper amount, as against this objection; but such an attempt would be pure guesswork, for the city at no time treated the improvements as separate and distinct. *Dyer v. Chase*, 52 Cal. 441; *In re Public School*, 75 N. Y. 324.

Again, the published notices did not correspond with the ordinances and resolutions; nor did the notices for proposals for bids cover the situation as it then existed. This of itself is a fatal defect.

2. SAME.

But it is argued that plaintiff's intestate waived all objections by standing by and seeing the work done without protest. Had he known that there would be an attempt made to charge his property with the expense of grading, this might, perhaps, be true; but the evidence shows affirmatively that he did not know of this fact; hence there was and can be no waiver.

3. ASSESSMENTS:
waiver of ob-
jection.

Further, it is argued that, as he did not appear before the city council and object to its action in the premises, he cannot now proceed in equity. If the assessments were void, he was not bound to appear and object, but might proceed in equity after the illegal assessments were made. *C. M. & St. P. R. R. v. Phillips*, 111 Iowa, 377. That they were void, is, we think, apparent from what has already been said. The city had no authority to proceed as it did.

4. SAME.

Again, it is contended that, as plaintiff did not offer to pay the amount which might properly be assessed against him, his action will not lie. There are two answers to this.

The first is that he did offer to pay whatever amount could properly be taxed against his property, and

5. **TENDER.** the second is that there is no means of showing what amount he should pay. The matters were so intermingled that it is impossible to say what amount should be taxed. Moreover, the defendants did not make any showing as to what amount plaintiff's intestate should pay. In *Allen v. Davenport, supra*, and other like cases, relied upon by appellees, the assessments and contracts were separately made; and the exact amount of the legal assessment could be easily determined. Aside from this, the entire proceedings were void, for the reasons stated, and plaintiff was not bound to tender anything before bringing his action.

Whether or not action may be had against the property or the owners thereof on a reassessment, or on the basis of *quantum meruit*, we shall not now attempt to decide. There were such defects in the proceedings that plaintiff's intestate was entitled to enjoin the sale of his property for the invalid assessments. The decree is therefore reversed, and the cause remanded for further proceedings in harmony with this opinion.

Reversed and *remanded*.

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HENRY TSCHOHL, JOHN TSCHOHL and JOSEPH VOGT, Appellees, v. THE MACHINERY MUTUAL INSURANCE ASSOCIATION, Appellant.

New trial: DISCRETION: EVIDENCE. The granting of a new trial is
 1 peculiarly a matter of discretion with the trial court and in the absence of a showing of its abuse the ruling will not be disturbed. Evidence considered and held insufficient to show an abuse of discretion. .

New trial: APPLICATION. An application for a new trial based on a
 2 supposed agreement with counsel, which fails to allege that the agreement was not performed, is insufficient.

New trial: SHOWING OF DEFENSE. An application for a new trial after
 3 judgment by default must set forth a good defense to the action.

Appeal from Clayton District Court.—HON. L. E. FELLOWS, Judge.

SATURDAY, DECEMBER 17, 1904.

APPEAL from an order denying defendant's petition for new trial.—*Affirmed.*

W. N. Birdsall and *V. T. Price*, for appellant.

W. C. Lewis and *D. D. Murphy*, for appellees.

WEAVER, J.—The petition for a new trial was filed after the term at which a judgment was rendered in favor of plaintiffs, and is based on a showing that appellant's principal attorney engaged to try the cause in its behalf was in ill health, and was relying upon an agreement of plaintiffs' counsel to notify him when the cause was assigned for trial, and that by reason of the counsel's sickness as aforesaid, and his reliance upon the understanding with the attorney on the other side, he failed to appear, and judgment went against appellant by default. The trial court heard the testimony offered in support of the petition, and refused to reopen the case. As we have had frequent occasion to remark, the granting and refusing of applications for new trial are matters so peculiarly within the discretion of the trial court we will not interfere with its order unless it appear that such discretion has been abused. The record does not disclose such a case. In the first place, the petition itself, if we take for granted all it alleges, does not show good ground for the setting aside of the judgment entered. The allegation of sickness is not that counsel was thereby wholly unable to attend to his business, but that he was unable "to give full and careful attention to business." In his testimony he says that at the date of the judgment he was confined to his house probably half the time, and, while going to his office at in-

tervals, was under the doctor's care. It is quite manifest, however, that had he deemed it necessary or advisable he could have informed the court of his condition and asked for time, or, if necessary, could have secured the aid of other counsel in preparing and presenting a motion for continuance.

The allegation of his reliance upon the supposed agreement with opposing counsel is also unavailing, for the petition nowhere states that the expected notice was not in fact given. It is to be said, also, that while the claim concerning this agreement is doubtless made in perfect good faith, the testimony appears to indicate that the understanding which existed between counsel had reference only to a former term of court, and that the subsequent reliance thereon by the attorney for appellant was the result of a misapprehension on his part.

A further and sufficient reason for upholding the order appealed from is to be found in the failure of the appellant to make any sufficient showing of a good defense to the plaintiff's claim.

The order refusing a petition for new trial is *affirmed*.

RUDOLPH J. ALLEN, Appellee, v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

Negligence: PLEADING: INSTRUCTION. Where the only negligence
1 charged was want of care on the part of the engineer in failing to observe an order and in running his train at such speed as to make a sudden stop necessary, and the evidence showed that a sudden stoppage of the train was justified by the emergency, an instruction that for plaintiff to recover he must establish by a preponderance of evidence that while in the discharge of his duties as brakeman he was thrown from the train and injured, without fault on his part, by the negligence of the engineer in making a violent stoppage of the train, was error.

Negligence: EVIDENCE. In an action for injury to a brakeman, the
2 evidence is considered and held insufficient to support a submission
on the theory that the engineer was negligent in suddenly stop-
ping his train.

Appeal from Fayette District Court.—HON. A. N. HOBSON,
Judge.

SATURDAY, DECEMBER 17, 1904.

ACTION to recover damages for a personal injury. At the time of the accident of which he complains, plaintiff was in the employ of defendant in the capacity of head brakeman on a freight train. The train was composed of an engine and fifteen cars, and was running as an extra between Jackson Junction and Calmar. At Jackson Junction the conductor and engineer of the train received orders to look out for a work train on the track between the junction and Ft. Atkinson, the next station. The petition was in two counts. The substance of the allegations of the first count respecting the happening of the accident and the negligence out of which the same arose are as follows: That when near Ft. Atkinson the train came suddenly upon a work train, consisting of an engine, several cars, and a pile driver, standing upon the track; that upon coming in view of such obstruction the engineer gave the whistle signal for brakes, to which plaintiff, who was riding in the cab of the engine, at once responded; and that, "while thus acting, plaintiff's co-employees on said train, in their efforts to stop the same and thus prevent a collision with the said obstruction, caused an unusual lurch or jar of said train," whereby he was forcibly thrown from the car upon which he was attempting to set brakes, and injured. Further, it is said that the defendant was negligent, causing his injury, for that the engineer of the train, having been advised of the existence of said work train on the track, and having been ordered to "pro-

tect yourself against work train," failed to notify plaintiff of said order, as it was his duty to do, and

Did run and operate his engine and train * * * without protecting himself or train against said obstruction, and did negligently and without care on his part, and in violation of said order, run and operate said train around a curve and through the timber down a steep grade where the view was obscure without protecting the same, as by said order he was directed, against said obstruction; and did negligently run and operate said train to a point in such close proximity to said obstruction that he deemed it necessary to and did call for brakes, and plaintiff's co-employés did make a violent stoppage of said train, and caused a sudden and unusual jerk and lurch of the same, all in violation of said order and instruction; and did thereby, by said negligent acts, cause the injuries to plaintiff herein complained of; whereas, had the engineer obeyed the said order, * * * the said sudden stoppage of said train would not have been necessary, and plaintiff would have received no injury therefrom.

In the second count, the circumstances of the accident are alleged, and negligence is charged in that "the employés of the defendant engaged in operating said 'pile driver' and work train were negligent and careless in failing to flag the extra train and the employés thereon, on which plaintiff was employed, of the presence and locality of said work train upon the defendant's track, as they were required to do under the rules of the defendant and the customs and practices in vogue upon the defendant's railway." The answer makes general denial, and pleads an assumption of the risk. From a verdict and judgment in favor of plaintiff, the defendant appeals. — *Reversed.*

H. H. Field, J. C. Cook, H. Loomis, and H. P. Hancock, for appellant.

Albrook & Lundy and Rickel, Crocker & Tourtellot, for appellee.

BISHOP, J.— In submitting the case to the jury under the first count of the petition, the court gave but one instruction having relation to the charge of negligence, and that was upon its own motion, and as follows: “ In

1. NEGLIGENCE: pleading: instruction. order for plaintiff to recover, it is necessary for him to establish by a preponderance of the evidence before you that while in the discharge of his duties as brakeman he was, by the negligence of the engineer in making a violent stoppage of the train in such a manner as to cause an unusual jerk or lurch, whereby the plaintiff was thrown from the train and received injuries complained of, without fault or negligence on his part.” Appellant contends for error in respect of the instruction thus given — and it is the argument that the charge of negligence as contained in the petition is addressed solely to the want of care on the part of the engineer in failing to observe the order given him, and in running the train at such a rate of speed as to make a sudden stop necessary — that it is not charged that the act of stopping the train, considered by itself, was negligent; and, further, that the case as made by the evidence for plaintiff shows conclusively that the sudden stoppage of the train was justified by the exigencies of the situation, and the act did not therefore involve negligence.

A careful reading of the petition makes it clear that the contention of the appellant should be sustained. It will be observed that the acts of commission relied upon to constitute negligence are charged in one sentence of the petition, and it is apparent that the thought of the pleader was that, without care and in disobedience of the order under which he was proceeding, the engineer had run his train to a point where it became necessary for him to make use of extraordinary and violent measures to stop his train and thus avoid a collision; whereas, and in the language of the petition, had he obeyed the order given him, the sudden stoppage of the train would not have been necessary. That the situation, as given expression to in the pleading, makes out a

case of negligence, does not seem open to question. There is but a single charge of negligence, however; that is to say, the improper operation of the train, and the sudden stoppage thereof, are to be taken as component parts of one breach or failure of duty. This must be so because, in the first place, the manner in which the train was operated, considered by itself, was not negligence as to plaintiff. In the second place, the sudden stoppage of the train, also considered by itself — and conceding the necessity of avoiding a collision — was not negligence as to plaintiff. Negligence can be predicated only upon a failure to perform a duty owing to him who sustains an injury by reason of such failure. This is elementary. Now, the operation of the train, although careless and in violation of orders, did not alone result in any injury. On the other hand, it ought not to require argument to make clear that, a collision being imminent, there could be no failure of duty on the part of the engineer in that he resorted to extreme measures to avoid such collision. Quite to the contrary, we think such act would be in the strict line of his duty. Certainly, if the engineer had suddenly and without warning come upon the work train, every obligation of duty would require at his hands that he use every instrumentality provided for the purpose to effectuate a timely stoppage of the train, even though a "sudden and unusual jerk and lurch of the same" was occasioned thereby. We do not say that negligence might not be charged in such a case, it being made to appear by allegation that improper means were employed, or that proper means were improperly employed, by the engineer. But that is not this case. Here the allegation is, simply, that in the face of an impending collision the engineer "deemed it necessary to and * * * did make a violent stoppage of the train." The sudden stoppage of a freight train, even though accompanied by a violent or unusual jar, does not of itself constitute negligence, and, in the case of an employé, the fact of an accident occasioned by the operation of a train on which he is employed does not

give rise to a presumption of negligence. *Whitsett v. Railway*, 67 Iowa, 157; *Kuhns v. Railway*, 70 Iowa, 561; *O'Connor v. Railway*, 83 Iowa, 105; *Case v. Railway*, 64 Iowa, 762.

Passing now the pleading, and looking into the evidence, the error of the instruction is made still more apparent. The evidence for plaintiff tends directly to prove that the country through which the road ran was rough, and the track very crooked; that there were cuts, and snow fences, and timber along the line that obstructed the view; that for about a mile out of the junction it is an up-grade, and then the grade descends toward Ft. Atkinson; that as the train came down the grade it was running at the rate of about twenty miles an hour. Plaintiff says that as the engine rounded a curve he discovered the work train on the track about forty rail lengths away, and called the attention of the engineer thereto. The latter, he says, at once made application of the air to the brakes; that they failed to work apparently, for that the engineer then sounded the whistle signal for hand brakes, and this, he says, was not usual when the air was working and in order. Plaintiff responded to the signal for brakes, and was in the act of climbing the ladder on the first car when the jolt or jerk came. He attributed the shock to a reversal of the motion of the engine, although he says that an emergency application of the air to the brakes would have been equally severe in its results. Whether or not the train could have been stopped in time to avoid a collision by the use of hand brakes, or a service application of air, is left in extreme doubt. Plaintiff gives it as his opinion, founded upon many years of train service, that a stop would have required about a quarter of a mile. The situation is not aided by the evidence on behalf of defendant, for that all tends to prove that the train was running about five miles an hour only, and was brought to a full stop within its length by a service application of the air brakes alone; that there was no unusual jar or jolt incident

to the stoppage. We conclude that the case submitted to the jury was not the case made by the pleadings and the evidence introduced thereunder, and this was error. It follows that a new trial should have been awarded, and the case will be remanded for that purpose.— *Reversed.*

GEORGE B. EWART, Appellant, v. MARGARET EWART, ET AL.,
 Defendants, SAMUEL F. EWART and ELIZABETH
 EWART, Appellees.

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| 126 | 219 |
| 139 | 682 |
| 139 | 683 |

Partition: APPEAL: NECESSARY PARTIES. Service of notice of appeal
 1 need not be made on coparties whose interests cannot be prejudi-
 cially affected by the appeal.

Evidence: DEED GIVEN AS SECURITY. In an action to partition the
 2 property belonging to an estate, the evidence is reviewed and held
 to show that a deed given deceased by one of the heirs was in
 fact a mortgage, and that the indebtedness secured thereby had
 been paid.

Appeal from Ida District Court.—HON. Z. A. CHURCH,
 Judge.

SATURDAY, DECEMBER 17, 1904.

SUIT in equity for the partition of land. The plaintiff and the defendant Samuel F. Ewart are the sons of George Ewart, who died intestate in October, 1897. The parties hereto are all residents of the State of Pennsylvania. The land involved in the controversy was owned by the defendant Samuel F. Ewart, and was by him conveyed to his father, George Ewart, on the 10th day of August, 1893, and the title thereto stood in the father's name at the time of his death. At the time the deed was executed and delivered, the grantor, Samuel F. Ewart, was engaged in business in Pittsburg, Pa. He was financially involved, and the evidence is undisputed that his father gave him his individual

note for \$5,700, which he discounted at a Pittsburg bank, and that he used the proceeds thereof in paying at least a part of his debts. In his answer and cross-petition Samuel F. Ewart alleged that the deed was given solely as security for his father's accommodation, and was in equity a mortgage only. He asked an accounting, and that the title to the land be quieted in him as against said deed. There was a judgment for the defendant Samuel F. Ewart, from which the plaintiff appeals.—*Affirmed.*

Charles S. Macomber, for appellant.

Homer S. Bradshaw, for appellee Samuel F. Ewart.

SHERWIN, J.—The appellee filed a motion to dismiss the appeal because all parties were not served with the notice thereof. The record shows conclusively that all parties to the suit except the wife of Samuel F. Ewart are interested therein adversely to him, and that their interests are identical with the interest of the plaintiff. His success depends upon a finding that the land belongs to his father's estate, and when it is determined that it does all of the other heirs are benefited thereby. The determination of the plaintiff's rights upon this appeal cannot, therefore, prejudicially affect the rights of the codefendants of Samuel F. Ewart, and we think they are not necessary parties to the appeal. Section 4111 of the Code provides for service of notice of appeal upon coparties, but such notice is evidently not necessary unless the rights of such parties may be prejudicially affected by the appeal. *Hunt v. Hawley*. 70 Iowa, 183; *Bowman v. Besley*, 122 Iowa, 42. The motion to dismiss is therefore overruled.

This is a fact case, and we think it clearly shown by the direct testimony of the witnesses and by the facts and circumstances in evidence that the deed was given to the father as security for the credit he extended to the son when he

gave him the note in question. We shall not review the evidence, but may say that, aside from the inferences that might be drawn from the conduct of the appellee after his father's death, there is no

2. EVIDENCE:
deed given
as security.

substantial evidence in the record negating the claim of the appellee. At the time the deed was made the land conveyed thereby was worth at least \$9,000. At the same time, and as additional security, a bill of sale of personal property worth over \$2,000 was also made in favor of the father, and placed in the hands of a third party for his use. A part of the note given by the father to the appellee was in fact paid by the appellee. It was a short-time note, and was renewed from time to time, covering a period of three or four years, though its maker was a wealthy man, able to pay it at any time. These and many other circumstances appearing in evidence corroborate too strongly and too certainly the positive testimony of witnesses who had personal knowledge of the transaction for us to say that such witnesses are unworthy of belief; and, considering the evidence as a whole, but one conclusion can be reached. The appellee's apparent recognition of absolute title in the estate after his father's death is fairly explained, and, as thus explained, it was not inconsistent with his present position. It may be conceded that an undelivered bill of sale of personal property will pass no title thereto, but, unless we disregard the positive testimony of at least two competent witnesses, the bill of sale was treated by all parties as affective as security before the father bought the property in at the sheriff's sale; and it further appears that this purchase was made for his own and his son's protection. When the appellee repurchased the box factory from the estate, he was in fact paying a part of his indebtedness to the estate, and in a final accounting of the whole transaction he should be credited with the amount so paid. It appears, however, that the rents received from the land and the profits received from the factory while operated by the father largely exceed the amount due the estate. The record

does not establish the claim that the transfers in question were made for the purpose of delaying and defrauding creditors. On the contrary, it conclusively appears that the money raised by discounting the father's note was used in the payment of debts, and that all of the debts of the defendant were in fact paid eventually. We reach the conclusion that the deed is in fact a mortgage only, and that the indebtedness secured thereby has been fully paid and discharged.

The judgment is therefore *affirmed*.

JACOB HYDINGER, Appellee, v. THE CHICAGO, BURLINGTON
AND QUINCY RAILWAY CO., Appellant.

New trial. Where a motion for a new trial is based upon several
1 grounds and is sustained generally, the appellant must not only
show an abuse of discretion but that none of the grounds were
good, to obtain a reversal.

Misconduct of juror. Proof that jurymen, while deliberating upon
2 the case, stated their personal knowledge of facts relevant to the
issues, and that outsiders discussed the case in the presence of
members of the jury in such a manner as to create prejudice, will
authorize a new trial.

New trial: INSTRUCTIONS. An instruction on the theory that an issue
3 is in the case which is not in fact tendered by the pleadings, is
ground for a new trial.

Appeal from Fremont District Court.—HON. A. B. THORNELL, Judge.

SATURDAY, DECEMBER 17, 1904.

THIS is an appeal from an order sustaining plaintiff's motion for a new trial in an action wherein he sought to recover damages from defendant for flooding his (plaintiff's) land. The case was tried to a jury, resulting in a verdict for the defendant. From the order sustaining the motion for a new trial, defendant appeals.—*Affirmed*.

H. J. Nelson, George E. Draper, and T. S. Stevens, for appellant.

W. E. Mitchell and R. C. Campbell, for appellee.

DEEMER, C. J.—Plaintiff claims that the defendant obstructed the flow of the Nishnabotna river in such a way as to overflow his land, which is agricultural in character, destroying his crops growing thereon, and otherwise injuring him. Defendant pleaded that the flooding of plaintiff's land was due to an unprecedented flood, which it could not have anticipated or guarded against. It also pleaded a prescriptive right to use its roadbed and the bridge maintained over the stream in the manner in which it used and constructed them. Further, it alleged that the structures built by it were permanent in character, erected more than thirty years ago, and that plaintiff's action, if any he has, is barred by the statute of limitations. It also pleaded authority from the State of Missouri, in which State the bridge and structure of which plaintiff complains are located, to construct and maintain the same in the manner it did. The statute of limitations of the State of Missouri was also pleaded as a complete defense to plaintiff's action. On these issues, as well as a general denial filed by defendant, the case was tried, resulting in a verdict for the defendant.

Plaintiff filed a motion for a new trial, which was bot-tomed on at least twelve grounds. This motion was sus-tained, but the order granting it was general in character, so

that we have no means for knowing upon what
1. NEW TRIAL. . . specific ground or grounds the ruling was made.

In such cases an appellant must show, in order to obtain a reversal, that none of the grounds were good. Moreover, he must also make it appear that the trial court abused its dis-cretion in setting aside the verdict of the jury and granting a new trial. Naturally, we are much more reluctant to inter-fere when the trial court grants a new trial than where it

denies it, for the obvious reason that the order is followed by a retrial in the one case, and not in the other. Again, the trial court is in a much better position than we are to ascertain the real facts, both direct and incidental to the main action, and has a much larger discretion with jury verdicts than an appellate tribunal. It may set aside a verdict as contrary to the evidence, if it is so advised, whereas we, as a rule, do not interfere if there be a substantial conflict therein. The finding of the trial court, who heard the testimony and saw the witnesses, is thrown into the scale, and made to do duty in support of the ruling.

The principal points now relied upon in support of the court's ruling are: (1) that there was error in instructing the jury as to an issue not tendered by the pleadings; (2)

**2. MISCONDUCT
OF JUROR.**

that, if such issue had been tendered, the court erred in its instructions as to the law; (3) that the jury was guilty of misconduct, in that some of their number stated in the jury room facts of their own knowledge with reference to the issues in the case; and (4) that plaintiff did not have a fair and impartial trial. As to the alleged misconduct of jurors, testimony was taken by the trial court, which, if believed by the judge — as it evidently was, or might have been — was sufficient in itself to justify the setting aside of the verdict. Not only did some of the jurors give their personal knowledge in the jury room, but outsiders talked and argued the case in the presence of the jurors, or some of them, in such a manner as to prejudice plaintiff's case.

The damage, if done by the defendant, was due to some piles left in the river by it, and to the throwing of stone into the bed of the stream about the piers of the railway bridge crossing the stream. From the statement of the

**3. NEW TRIAL:
instructions.**

issues tendered by the defendant it will be observed that no claim was made by it that these piling or the throwing of the stone into the river were necessary for the protection of the bridge piers; nevertheless the court in-

structed on the theory that this issue was in the case. In so doing there was error, which would justify the sustaining of the motion. On either or both of the grounds above suggested, the trial court might very well have sustained the motion. As the case is to be retried, we refrain from expressing an opinion as to the other matters argued.

The order sustaining the motion for a new trial is *affirmed*.

LIQUID CARBONIC ACID MANUFACTURING COMPANY and
LENORE ST. CLAIR, Appellants, v. PHOENIX INSURANCE COMPANY OF LONDON.

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| 126 | 225 |
| 141 | 610 |

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| 126 | 225 |
| 144 | 331 |

Insurance: WAIVER OF CONDITIONS: AUTHORITY OF LOCAL AGENT.

Code section 1750 providing that any officer, agent or other representative of an insurance company who may solicit insurance or transact the business generally of such company shall be held to be an agent with authority to transact all business within the scope of his employment, prohibits any limitations upon the authority of an agent having the powers enumerated in said section to transact all business within the apparent scope or usual extent of his employment; and under this section a local agent may waive the conditions of a policy and consent to an incumbrance upon the property.

Appeal from Mahaska District Court.—HON. JOHN T. SCOTT, Judge.

SATURDAY, DECEMBER 17, 1904.

SUIT at law upon a contract of fire insurance issued to the plaintiffs' assignor. There was a trial to a jury, and a directed verdict for the defendant, from which the plaintiffs appeal.—*Reversed*.

H. H. Sheriff, Carr, Hewitt, Parker & Wright, and J. F. & W. R. Lacey, for appellants.

Edmund H. McVey and Gleason & Preston, for appellee.

SHERWIN, J.—The policy in suit was issued by the defendant, through its local agent at Oskaloosa, Chas. E. Brown, to the Oskaloosa Cigar Company, in January, 1901; A. J. St. Clair being at the time the manager of the cigar company. On the 18th day of June, 1901, the policy was assigned to St. Clair, with the consent of the defendant, through the agent, Brown. The business had at that time been changed into a bottling works, and an indorsement was attached to the policy covering the bottling machinery and some household goods. On the 7th day of August, 1901, a chattel mortgage was given by St. Clair to W. R. Lacey, covering the property insured by the policy. A large part of the bottling machinery was bought of the plaintiff manufacturing company some time in April or May, 1901, under a conditional contract whereby the company retained a lien upon the property for the purchase price. This contract was not recorded, however, until the 27th of August, 1901.

The policy contained a stipulation that it should be absolutely void, unless otherwise provided by agreement indorsed thereon or added thereto, if the property insured, or any part thereof, should be mortgaged, "or if any persons than the assured now have, or shall hereafter acquire any interest in or lien on the property hereby insured or any part thereof." The policy also contained this provision:

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company, except the general manager of this company in Chicago, shall have the power to waive, change or modify any provision or condition of this policy, except such as by the terms of this policy may be the subject

of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative, except the general manager of this company in Chicago, shall have such power, or be deemed or held to have waived, changed or modified such provisions or conditions, and such waiver if any, shall be written hereon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

It is conceded there was a breach of the contract, and, unless it be shown that there was a waiver thereof by the defendant, no recovery can be had on the policy. There was evidence tending to prove that the local agent, Brown, was notified of the conditional contract with the manufacturing company, and of the mortgage to Lacey, and that he consented thereto, and agreed to have the proper indorsement made on the policy, and subsequently told St. Clair that the policy was all right without such indorsement. It must be conceded, for the purposes of this opinion, that the evidence on this subject was sufficient to warrant the jury in finding that Brown had knowledge of the change of title and of the mortgage, and that he orally consented thereto. What, then, was his actual authority in the premises? His appointment as agent was contained in a written instrument which authorized him "to receive proposals for insurance: to receive moneys and to countersign, issue and renew policies of insurance subject to such rules and regulations as are or may be adopted by said company." The appellant contends that the policy itself gave the local agent authority to waive, change, or modify the provisions or conditions thereof, provided only that such waiver be in writing indorsed thereon. The provision of the policy will not bear this construction, however. It says that no agent except the general manager shall have power to waive, change, or modify any provision or condition of the policy, except such as by the terms thereof may be the subject of

agreement indorsed thereon, and that, as to those provisions, no agent except such manager "shall have such power, or be deemed or held to have waived, changed or modified such provisions or conditions, and such waiver, if any (clearly meaning the waiver made by the general agent) shall be written upon or attached thereto." The substance of this provision is that waivers can only be made by the general agent in Chicago, and that when so made by him they must be in writing indorsed upon the policy. So far, then, as the policy is concerned, there was no authority given to Brown to modify or change its conditions. On the contrary, he was expressly prohibited from so doing. If, therefore, he had any actual authority to change or modify any of its conditions, such authority must be found elsewhere than in the policy. The written appointment to which we have referred did not make him the general agent of the company, or give him authority to change or modify the conditions of the policy after it was issued, and nowhere in the record is there evidence tending to show that the actual authority given by the written appointment was enlarged in any way by the company. Brown testified that he never made indorsements upon policies without the approval of the company, and there is no evidence contradicting him on this subject. Considering this evidence in connection with the limitations of the policy, it is clear that, under the decisions of this court prior to the enactment of section 1750 of the Code, Brown had no power to bind the company by such waiver. *Ruthven v. Ins. Co.*, 92 Iowa, 316; *Kirkman v. Ins. Co.*, 90 Iowa, 457; *Taylor v. Ins. Co.*, 98 Iowa, 521; *O'Leary & Bro. v. Ins. Co.*, 100 Iowa, 179.

This brings us to the consideration of section 1750 of the Code, which was enacted in 1897, and which, so far as it relates to this case, is as follows: "Any officer, agent or other representative of an insurance company doing business in this State who may solicit insurance, procure applica-

tions, issue policies, adjust losses or transact the business generally of such companies, shall be held to be the agent of such company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws or articles of incorporation of such company to the contrary notwithstanding." If this statute was intended to, and does, inhibit any limitations or restrictions upon the authority of an agent having the powers enumerated therein to transact all business within the apparent scope or usual extent of his employment, the local agent, Brown, could waive the conditions of the policy and consent to the incumbrance upon the property. In *Viele v. Ins. Co.*, 26 Iowa, 9, decided in 1868, this court held that a local recording agent having power to issue and countersign policies could waive the conditions in a policy, and the forfeitures arising therefrom, in the absence of limitations upon his authority brought to the knowledge of the assured; and this has been the rule recognized in this State, as well as in other States, since that time. *Garretson v. Ins. Co.*, 81 Iowa, 729. For the evident purpose of avoiding the effect of such decisions, insurance companies inserted conditions and provisions in their policies limiting the powers of the local agent, so that no waiver of conditions or forfeitures could be made except by a designated person — usually some general agent residing at some other place. Policies containing such restrictive clauses have frequently been before this court, and the limitations held valid. *Ruthven Bros. v. Ins. Co.*, 92 Iowa, 316; *Kirkman v. Ins. Co.*, 90 Iowa, 457; *Taylor v. Ins. Co.*, 98 Iowa, 521; *Zimmerman v. Ins. Co.*, 77 Iowa, 691.

These decisions do not hold that there can be no waiver by the local agent in the absence of limitations upon his authority of which the assured has knowledge, and hence they are not in conflict with the *Viele Case*, and other decisions of this court along the same line. They rest upon

the restrictions and limitations upon the agent's authority expressed in the contract of insurance. The enforcement of such limitations often resulted in denying the assured recovery when it was manifest that the act of the local agent upon which he had relied was clearly within the apparent scope of his employment, because of the peculiar nature of the insurance business. It is of necessity transacted through such agent. He solicits the risk, and issues and countersigns the policy; and it is to him that the policy holder goes for changes in his policy made necessary by the varying conditions of his business, and for all other matters relating to his insurance. The policy holder depends entirely upon such agent, and knows no one else in the transaction. The inequity of these restrictive conditions was apparent to every one having even superficial knowledge of the insurance business. The legislature, having in mind the power of the local agent under the decisions of this and other courts in the absence of such restrictive clauses, and the decisions made necessary by them, undoubtedly enacted the statute for the express purpose of prohibiting the limitation of the agent's power by provisions in the contract. This is the only logical construction of the statute, in view of the previous decisions and the general policy of legislative control of the business.

It was error, therefore, to hold that Brown had no authority to waive the conditions of the policy, and on all questions of fact the case should have been submitted to the jury.—*Reversed.*

CHARLES A. GREGORY, Administrator, v. WABASH RAILROAD Co., Appellant.

Railroads: EVIDENCE: RATE OF SPEED. A witness familiar with the
 1 running of trains and shown to have a general knowledge of their rates of speed, may give an opinion as to the speed of a particular train which he has observed.

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| 128 | 284 |
| 128 | 230 |
| 131 | 71 |

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| 126 | 230 |
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| 126 | 230 |
| 144 | 341 |

Negligence: QUESTION OF FACT. Where an engineer discovered a
2 child of tender years upon the track, the question of whether his
failure to sound the whistle was the exercise of a prudent judgment,
was one of fact for the jury.

Negligence: INSTRUCTION. In determining the question of an en-
3 gineer's negligence in failing to sound the whistle after discovering
a child upon the track, an instruction that the jury might consider,
among other things, whether an alarm would have frightened the child,
and if so, whether the result would have been to cause it to remain
on the track or move off, was properly given.

Negligence: FACT QUESTION. A railway company is not liable because
4 of a failure of the engineer to sound the whistle when the accident
would inevitably have happened, but the question of whether such
signal would probably have avoided the accident is for the jury.

Trespasser: DISCOVERY OF PERIL: EVIDENCE. The testimony of en-
5 ginemen as to when they first discovered the peril of a trespasser
on the tracks is not conclusive on the subject, but all the circumstances
bearing on the question are for the consideration of the jury.

Evidence: OBJECTIONS. An objection to questions in an action for
6 negligence, that they call for evidence of distinct prior acts of
negligence, cannot be urged for the first time on appeal.

Misconduct: ARGUMENT. Where misconduct in argument is not so
7 flagrant that it could not have been prevented or its resulting
prejudice removed by an instruction, the cause will not be reversed
on appeal on account thereof, no objection thereto having been
raised in the trial court.

Evidence: IMPEACHMENT. Where an engineer had testified that he
8 did not sound the whistle, and denied on cross-examination that at
a certain time and place and in the presence of certain persons
he stated that he did give the signal, it was competent to show that
he made the latter statement, not as an admission binding upon the
company but for impeachment purposes.

Negligence: LIABILITY OF RAILWAY COMPANY. The liability of a rail-
9 way company for the death of a trespasser upon its tracks, is not
dependent upon the willful and wanton act of the trainmen, but
a failure to exercise the highest possible degree of care to avoid
the accident after the peril is discovered, will fix its liability.

Evidence: VALUE OF LIFE EXPECTANCY. Evidence in an action for the
10 death of a girl two years old, that her parents were farmers and
that the wages of female school teachers in that locality were from
\$30.00 to \$35.00 per month, is held sufficient to take the case to the
jury on the value of her life to her estate.

Appeal from Appanoose District Court.—HON. M. A. ROBERTS, Judge.

SATURDAY, DECEMBER 17, 1904.

ACTION to recover damages for the death of plaintiff's intestate, due, as alleged, to the negligence of defendant's employés in the operation of a train. Verdict for plaintiff for \$1,210. From judgment on this verdict, defendant appeals.—*Affirmed.*

Fee & Fee, for appellant.

C. F. Howell and *W. R. C. Kendrick*, for appellee.

MCCLAIN, J.—Plaintiff's intestate, a female child about two years of age, was killed by being run over by the engine of a passenger train on the defendant's track, at a place where there was no crossing or footway, either by law or custom; and the questions argued relate to the negligence of the engineer operating the engine, and the measure of damages in accordance with which recovery was allowed.

I. Several witnesses for plaintiff testify as to the speed of the train just before the accident, the question of speed being important in determining whether, after the child was seen by the engineer, he could by the exercise of reasonable prudence and diligence have stopped the train. The witnesses were shown to have traveled on trains and noticed their rates of speed, and it appears to us that they showed themselves to be competent to give an opinion as to the rate of speed at which the train was running. If such witnesses are not competent, then it would be almost impossible to secure any evidence with reference to the rate of speed of a train from other witnesses than the employés of the company

1. EVIDENCE:
rate of
speed.

operating such train. One who is familiar with the running of trains, and who has general knowledge as to their rates of speed, may give an opinion as to the rate of speed of a particular train which he has observed. *Pence v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 389; *Van Horn v. Burlington, C. R. & N. R. Co.*, 59 Iowa, 33.

II. Plaintiff was allowed to introduce evidence, over defendant's objection, tending to show that no signal or alarm was given by the blowing of a whistle after the engineer saw the child on the track and before the accident. The argument for appellant on this point is that in the case of a child of such tender years the blowing of the whistle would not have served as a warning, but would have been quite as likely to stupefy the child with terror, and thus prevent its escape from the track, as to communicate to it a warning of danger of which it might take advantage for the purpose of escaping. But it seems to us that the question whether, in the exercise of a prudent judgment, the engineer should have given an alarm signal, was one of fact for the jury. Evidence was introduced on each side bearing on this question, and the engineer, as a witness, excused himself for not giving the alarm signal by explaining that it might have had the opposite effect from that intended. We cannot say as a matter of law that the sounding of the whistle would have increased the peril of the child, nor, on the other hand, that a child of such age, if its attention had been attracted by the signal, might not have got off the track and escaped danger. If the latter result would have followed, either by reason of the natural instinct to avoid danger on being frightened, or by reason of the exercise of an intelligent judgment, and if the engineer, in the exercise of a prudent judgment, had reason to believe that in either of these ways danger to the child would have been lessened by giving the signal, it was his duty to do so, and it was

2. NEGLIGENCE:
question of
fact.

proper to leave the question of fact to the jury. It might well be that if the child was not in immediate danger, but was so near the track that if frightened it might put itself in peril, not being of sufficient years of discretion to exercise a prudent judgment, then there would be a good excuse for not giving the alarm signal. But we can hardly see how, in the case of a child actually on the track and unconscious of the approach of a train, any increase of danger would be involved in giving the alarm signal, while there would be some possibility, at least, that the effect of the alarm would be to cause the child to get out of danger by reason of the instinct of self-preservation, if not in the exercise of an intelligent judgment. The question was properly submitted to the jury as one of fact. *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa, 602. And see, as having some bearing on the question, though not directly in point, *Graybill v. Chicago, M. & St. P. R. Co.*, 112 Iowa, 738; *McGill v. Minneapolis & St. L. R. Co.*, 113 Iowa, 358.

In this connection, we may notice a criticism of one instruction in which the court explained to the jury that in determining the question of the engineer's negligence they might take into consideration, among other things, "whether an alarm would have had the result to frighten the child, and if so, whether the result would have been to cause the child to remain on the track or to move off the track." It seems to us that this language suggests to the jury, the view which we have above expressed, and is not subject to criticism.

It is also urged in this connection that the defendant was not liable on account of the failure to give the signal after the danger to the child became apparent to the engineer, if the accident would necessarily have happened even if the signal had been given. Of course, this is true, but we think it was properly left to the jury to say whether the accident would

3. NEGLIGENCE:
instruction.

4. NEGLIGENCE:
fact question.

probably have been avoided if such signal had been given. In this respect the jury were fully and properly instructed.

III. Counsel contend that in rulings on evidence, in instructions to the jury, and in overruling the motion for a new trial, the court failed to properly apply the rule, recognized in this State, that as to a tres-

5. TRESPASSER:
discovery of
peril; evidence.

passer upon its track the railroad company is under no duty to look out for his safety until his danger becomes known to those operating the train; in other words, that there is no duty to look out for trespassers, but only a duty on the part of the company's employés, after they are aware that a trespasser is in danger, to exercise proper care to avoid injury to him. There is no controversy as to the correctness of this rule; but we have held that, in determining whether the employés of the company did see the trespasser in time to have avoided injury to him in the exercise of proper care, the plaintiff is not concluded by the testimony of the employés themselves as to when they did in fact become aware of the presence of the trespasser, but that all the circumstances bearing on that question are for the consideration of the jury. *Farrell v. Chicago, R. I. & P. R. Co.*, 123 Iowa, 690; *Johnson v. Chicago, M. & St. P. R. Co.*, 122 Iowa, 556; *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa, 667; *Barry v. Burlington R. & L. Co.*, 119 Iowa, 62. Therefore it was competent to show that the engineer's view of the track was unobstructed for a considerable distance as he approached the child, for this evidence, in connection with the evidence of the engineer that he was keeping a lookout, would bear on the question whether he did in fact see the child sooner than he testifies that he did see it. In this connection, testimony that alarm signals were given before the time when, as the engineer testifies, he did actually see the child, these signals having apparent reference to no other danger or cause of alarm than the per-

ceived presence of the child on the track, was competent as tending in some measure to indicate that the engineer did observe something on the track before, as he testifies, the child was first seen.

IV. Several objections are argued on the theory that the court allowed evidence to be introduced relating to prior fatal accidents caused by an engine in the charge of the engineer who was operating the engine which caused this accident. As an abstract

6. EVIDENCE:
objections.

proposition, proof of such prior accidents would not be admissible, unless, perhaps, as supporting the claim that the company was negligent in employing this engineer in view of their knowledge of his negligence on previous occasions. But there is no such question in this case. However, an investigation of the record shows that the objection made is not well founded. The engineer, who was a witness for the defendant, testified as to the effect which the giving of an alarm signal might have had upon the child, and referred to previous accidents in his experience. He was cross-examined with reference to these previous accidents, and led to disclose the fact that two men had at different times been run over and fatally injured by his engine while he was operating it. Counsel for plaintiff made great point of this in the cross-examination and in the argument to the jury; but with reference to the cross-examination it is to be noticed that no objection to the questions were made on the ground that they called for evidence of a distinct prior act of negligence. As this objection was not urged at the time, it cannot be urged now.

V. Much is said in argument about misconduct of counsel for plaintiff, not only in referring to the two previous accidents while this engineer was operating his engine,

7. MISCONDUCT:
argument. but also in explaining why not more than \$2,000 was claimed in the original petition

(the reason assigned being that the claim of a larger amount

would have enabled defendant to remove the case to the federal court), and in commenting on the amount recovered in another similar case. The remarks of counsel were apparently unwarranted; but no objection was made at the time, nor afterwards in motion for a new trial, and counsel are in the position, therefore, of asking us to reverse this case on a ground not brought in any way to the attention of the trial court. It must be borne in mind that in actions at law this court is a court for the correction of errors, and in general, in such cases, we can only review the action of the trial court as to objections which have been properly raised before it. It is possible, of course, that misconduct may be so flagrant that no action of the court could cure the error, and possibly in such cases we ought not to require the complaining party to go through the formality of objecting to the argument and asking for a new trial. Without passing, however, definitely on that question, we are satisfied in this case that the misconduct was not such that it could not have been prevented, or the resulting prejudice, if any, removed by a direction of the trial court to the jury; and under these circumstances we would not be justified in reversing on account of the misconduct alleged. *Taylor v. Pacific Mut. L. Ins. Co.*, 110 Iowa, 621; *Mackerall v. Omaha & St. L. R. Co.*, 111 Iowa, 547; *Gorham v. Sioux City Stockyards Co.*, 118 Iowa, 749; *Pence v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 389.

VI. A witness was permitted, over defendant's objection, to testify to statements afterward made by the engineer with reference to whether or not he gave an alarm signal.

This testimony was not competent to show
8. EVIDENCE: an admission binding on the defendant, but
impeachment. it was not introduced for that purpose. The
engineer, having testified that he gave no such signal, was
asked on cross-examination whether he did not at a time
and place specified, and in the presence of persons named,

say that he did give such signal; and, upon his denial, the testimony of the witness that such statement was made at the time and place described was admissible for purposes of impeachment, and it was plainly introduced for that purpose.

VII. The court instructed the jury that it was not necessary, in order to entitle the plaintiff to recover, that they find that the injury was inflicted willfully or intentionally by the engineer; and of this counsel for appellant complain, taking the position that where the injured person is a trespasser, and the liability of the company is only sought to be established on the ground that, after being aware of the danger to the trespasser, the employés of the company were at fault in not avoiding such danger, the action of such employés, in order to warrant recovery, must be willful and wanton. It may be true that in some of the cases of this character this court has referred to the willful and wanton character of the acts of railroad employés in failing to take reasonable precautions to avoid injury after the trespasser was seen; but certainly this court has never announced the rule that under such circumstances the company will not be liable unless the conduct of its employés was intentional, willful, or wanton; and, so far as we can discover, the rule uniformly adhered to has been that if, after the employés in charge of the train become aware of danger to a trespasser on the track, they can, by the exercise of such care as a reasonably prudent person would exercise under the circumstances — that is, the highest possible degree of care in view of the fact that human life is involved — avert such danger, it is their duty to do so; and the company will be liable for their failure in this respect, which failure will be attributed to the company as negligence. *Orr v. City Railway Company*, 94 Iowa, 423, 431; *Sutzin v. Chicago, M. & St. P. R. Co.*, 95 Iowa, 304; *Kelley v. Chicago, B. & Q. R. Co.*, 118 Iowa, 387; *Purcell v. Chi-*

9. NEGLIGENCE:
liability of
railway com-
pany.

cago & N. W. R. Co., 109 Iowa, 628; *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71; *Burg v. Chicago, R. I. & P. R. Co.*, 90 Iowa, 106.

By answers to special interrogatories propounded at the request of the defendant, the jury exonerated the engineer from intentionally or willfully causing the death of the child; but these answers did not exonerate him from neglect. It is evident that the jury found that he was negligent, though not acting with any intention or desire to cause the child's death. The jury were correctly instructed on the subject of neglect, and there was evidence to support the verdict in this respect.

VIII. Finally, it is urged that there was no evidence as to the value of the life of intestate to her estate. Evidence was introduced, apparently without objection, that the wages of female school-teachers in the vicinity of intestate's home were from \$30 to \$35 a month; but there was no other evidence as to the value of the life of a female child two years of age; that is, what the earnings of such child would be from the time of majority to the limit of expectancy of life. The father of the deceased was a farmer, and the mother his housekeeper. The court instructed the jury that the evidence as to these matters was not admitted for the purpose of establishing a presumption that the child would have become a school-teacher, and directed them that the evidence could be considered as bearing on the position in society and the relative status of the family in which the child lived, and the opportunities afforded in that locality to young women to pursue an independent calling, and that it was for the jury to say, "from these facts and all the evidence bearing on this question, with the assistance of the knowledge and observation common to all alike, what, if any, independent calling or business deceased would have followed, and the amount of the estate, if any, she would have accumu-

10. EVIDENCE:
value of life
expectancy.

lated had she lived out her expectancy." That in such a case the jury are not to be limited to award nominal damages merely because it is impossible to prove what the occupation of the child would have been, and the compensation which would have been received in such calling, is well settled. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71, 80; *Hively v. Webster County*, 117 Iowa, 672; *Eginoire v. Union County*, 112 Iowa, 558; *Farrell v. Chicago, R. I. & P. R. Co.*, 123 Iowa, 690.

If the court had been asked to direct the jury that in establishing the damages to the child's estate they should find the present worth of what the aggregate earnings of the child, from majority until the end of expectancy of life, less the ordinary expenses of living, would have been, no doubt some such instruction should have been given; but no instruction on this subject was asked, and we think that what the court said was not substantially nor prejudicially erroneous. *Andrews v. Chicago, M. & St. P. R. Co.*, 86 Iowa, 677, 685. In such cases, the best that can be done is to direct the jury as to the general basis on which the right to recover is founded, and allow them to fix such sum as is in their judgment reasonable. It is evident in this case that the jury did not allow the total amount of the earnings of a school-teacher at \$30 a month, nor even the total net earnings at that rate for the period of expectancy of life after majority, which appeared from the Carlisle Life Tables introduced in evidence. No complaint is made that the verdict is excessive, and we are satisfied that the jury did not adopt any unreasonable basis for computation of the amount.

We have discussed the principal errors which are relied upon; others which are urged are so obviously without merit that we do not find it necessary to refer to them. A motion to strike appellee's amended abstract is submitted with the case, but on an examination of the record we think that it should be overruled.

The judgment of the trial court is *affirmed*.

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131 740

C. F. BARTO V. IOWA TELEPHONE CO., Appellant.

Telephones: ELECTRICITY: NEGLIGENCE. A telephone company which
1 acquiesces in the use of its poles by an electric company, is charged
with the duty of seeing to it that the light wires do not expose
its employes to unusual danger.

Same. A telephone company permitting the use of its poles for carry-
2 ing electric light wires, must use a degree of care for the protection
of its employes commensurate with the danger involved.

Negligence: EVIDENCE. In an action by a telephone lineman for in-
3 juries caused by a defective electric light wire carried on the poles
of the telephone company, the evidence is reviewed and held to
justify a submission to the jury of the issue of defendant's negli-
gence.

Assumption of Risk. A telephone lineman not an inspector of wires,
4 nor charged with the duty of inspecting or testing live wires,
does not assume the risk of an injury resulting from a defective
light wire.

Contributory Negligence: EVIDENCE. A telephone lineman was in-
5 jured by coming in contact with a defectively insulated electric
light wire which the defendant carried on its poles; under the evi-
dence it is held that the question of the lineman's contributory
negligence was properly submitted to the jury.

Appeal from Woodbury District Court.—HON. GEO. W.
WAKEFIELD, Judge.

SATURDAY, DECEMBER 17, 1904.

APPEAL from judgment for damages caused by a fall
from a telephone pole. See 119 Iowa, 179.—*Affirmed*.

A. Van Wagenen, for appellant.

Henderson & Fribourg, for appellee.

LADD, J.—On the 18th day of April, 1901, the plain-
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tiff was employed as lineman by defendant and was engaged in stringing what are called "lead offs," being connections from the main line of telephone wires to residences or places of business of patrons. After ascertaining the wires with which to connect a laundry near the intersection of Court and Fourth streets he advised the wire chief, and was informed that a certain telephone was connected with a metallic circuit when it should have been a common return. In a metallic circuit two wires run all the way from the telephone to the central office, while in a common return one wire runs from the office to the telephone, and the current travels back over a wire common to several telephones, sometimes called the "McClure" wire. Plaintiff, in proceeding to remedy the defect, climbed the pole on which, about thirty feet from the ground, were two crossbars, and above these a "hickey" had been placed by the Sioux City Electric Light Company. A "hickey" consists of two iron strips fastened to the pole and extending above its end, supporting a crossbar. On this crossbar there were two electric light wires of one hundred and ten volts, and two primary wires, connecting alternating currents of one thousand and fifty volts each. A wire tapped one of these and ran down to the middle bar, and, after being wound around a peg, onto the fuse box, which was attached to the lower crossbar west of the post, and over the end of a supporting brace extending from the pole to the crossbar. This fuse box was six inches long by three or four inches wide, and is described as "fusible plug down in a receptacle to blow out or melt out in case of a short circuit on the line." A substance of lower conductivity than the wire is placed in it, and melts when two wires come together. A converter was attached to the north side of the pole, the top of it at the middle of the lower crossbar. This was about eighteen inches high and twelve or fifteen inches wide. Its purpose was to convert the current from a higher into others of lower voltage. In this instance

the current passing into a store near by was reduced to one hundred and four volts. A connecting coil, about one and one-half inches in diameter, of wire three-thirty-seconds of an inch thick, extended from the fuse box to the converter. Back of this wire was the iron brace previously mentioned, and as the coil was longer than seems to have been necessary it is supposed to have been blown back and forth by the wind against the brace until the insulation wore from the wire. The telephone wires were stretched over the middle and lower crossbars, save the common return, which was attached to a bracket fastened on the east side of the pole at the lower end of the brace supporting the middle crossbar. The plaintiff cut the return wire of the metallic circuit and attached it on the common return, which was on the bracket. He then had hold of the bracket with one hand, and in descending grasped the iron brace of the wire coil connecting the fuse box and the converter, when, as the evidence tended to show, he was struck by a current of electricity and fell to the earth.

I. The hickey, electric light wires, fuse box, and converter were placed on the pole without the defendant's consent, but, as these had remained thereon more than a year, it

1. **ELECTRICITY:** may well be assumed to have been done with
negligence. its acquiescence. That they were so placed by another company did not relieve the defendant of its duty to take reasonable precautions for the safety of its employes. Though the lineman is of necessity exposed to unusual dangers, it is the duty of the employer to see that the place where he is to perform his work is, in view of the situation; reasonably safe; that is, shielded from such perils as an ordinarily prudent and skillful man would, under like circumstances, guard against, and it is no excuse to say that an act in violation of this duty was that of another, if with the employer's consent or acquiescence. In other words, the obligation to provide the employé a reasonably safe place to work is an affirmative and continuing duty on the part of the

employer. If the defendant chose to allow the electric light company to use its poles, it became its duty to see that these were not so used as to expose the telephone company's employes to perils the risk of which was not assumed in entering such hazardous employment. See *McGuire v. Bell Tel. Co.*, 167 N. Y. 208 (60 N. E. Rep. 433, 52 L. R. A. 437); *Cherokee, etc., Coal Co. v. Britton*, 3 Kan. App. 292 (45 Pac. Rep. 100); *Trainor v. R. R. Co.*, 137 Pa. 145 (20 Atl. Rep. 632).

Counsel have stated in eloquent terms the advantages of electricity. The power supplied by it and manifested in different ways is now in common use. Its economic advantages are immeasurable. Its possibilities

2. SAME. are inconceivable. But unless properly handled it is also exceedingly dangerous, and those utilizing the agency cannot complain if a degree of care and skill in the construction and maintenance of necessary apparatus and machinery is exacted commensurate with the dangers involved. *McAdam v. Cen. R. & E. Co.*, 67 Conn. 445 (35 Atl. Rep. 341). See *Overall v. Louisville E. & L. Co.*, 20 Ky. 759 (47 S. W. Rep. 442). Such is the rule with respect to other instrumentalities, and no reason can be suggested justifying an exception in favor of electricity.

The wire coil connecting the fuse box with the converter could easily have been so hung as not to have come in contact with the iron brace, and so adjusting it that the insulation would be likely "by raking" against

3. NEGLIGENCE: the brace to wear off might well have been evidence. found to have been improper construction. It was as though an uninsulated wire had been left in direct contact with the brace. Of course the covering might have been expected to wear off, but when wires are so placed that this may occur at short intervals, because of coming in contact with other material, and where loss of insulation renders them dangerous, inspection should be made with such fre-

quency as appears reasonably necessary to discover and remedy defects, to the end that injury may not result therefrom. The lineman necessarily ascended on the opposite side of this pole, and when in that position his view of the wire was obstructed by the location of the fuse box, converter, cross-bar, and brace, and he would not be likely to search for a wire on the other side, not fastened to, but swinging against, the brace, especially if ignorant of the mechanism of the fuse box and converter. The defendant must be presumed to have known what every one else has observed, that linemen in going up and down poles take hold of the braces and other projections which do not appear to be dangerous, and in placing or permitting others to place wires and apparatus on these poles should have taken this custom into consideration in guarding against exposing its employes to unnecessary peril; and whether it did, in view of all the circumstances, exercise ordinary care and skill in so doing, was for the jury to decide.

II. That plaintiff assumed the risks incident to his employment no one questions. Had he been an inspector, or had the inspection of the poles and wires been a part of his duties, there would be much force in appellant's contention that he should be held to have known what it was his duty to ascertain. See *Anderson v. The Inland Telephone & Tel. Co.*, 19 Wash. 575 (53 Pac. Rep. 657, 41 L. R. A. 410); *Chisholm v. The New Eng. T. & T. Co.*, 176 Mass. 125 (57 N. E. Rep. 383); *Bergin v. New Eng. Tel. Co.*, 70 Conn. 54 (38 Atl. Rep. 888, 39 L. R. A. 195); *New Omaha T. H. E. L. Co. v. Rombold* (Neb.) 97 N. W. Rep. 1030. But he was not an inspector, and the record is void of any evidence upon which it could have been found that inspection was a part of his duty. True, he was required to report any defects he might observe, but he was not directed to look for them; was not furnished with any apparatus to test live wires; did not

4. ASSUMPTION
OF RISK.

know how, and was even ignorant of the method of testing by touching with the end of his fingers. Indeed the testimony tended to show that this was the only telephone pole in the city with a converter and fuse box attached to it, and that, though plaintiff appreciated the danger of coming in contact with electric wires, he had had no experience in protecting himself from them. Doubtless he did assume the risk of coming in contact with any wire which in the exercise of ordinary diligence he should have observed. But he was without knowledge of the mechanism of the converter and fuse box, and, as the connecting wire was concealed from view, cannot be held to have been negligent, as a matter of law, in not discovering it. If not charged with knowledge of the danger, it seems unnecessary to say that he cannot be held to have assumed the risk.

III. What has been said practically disposes of the contention that plaintiff was conclusively shown to have been guilty of contributory negligence. The additional element

5. CONTRIBUTORY NEGLIGENCE: evidence.

is the fact that he carried an insulating tape with which he might have wound the joint made by the lead-off wire with the common return. Had he done this he would not have been injured. Had he taken hold of the brace on the other side he would have escaped. He could have steadied himself by placing his arm about the pole. One of the pegs might have proven a safe hand-hold. Had he foreseen the danger of seizing the brace, another expedient would doubtless have been adopted. But he did not, and the other things he might have done are important only in determining whether he was guilty of any negligence in taking the course he adopted. Would a prudent man with one hand on the bracket, connected by a wire with the earth, situated as plaintiff was, have grasped the iron brace? He had been working with the return wire, which appeared to be safe, and as there was ground for concluding that he had no reason

to suspect that the brace was in contact with a live wire, the question of his negligence was an open one for the determination of the jury.

The rulings on the admissibility of evidence were correct, and the instructions refused, in so far as correct, were included in those given, which, when considered together, are not subject to the exceptions urged.— *Affirmed*.

WILLIAM OHLROGG v. THE DISTRICT COURT OF WORTH COUNTY, IOWA, AND CLIFFORD P. SMITH, JUDGE.

Intoxicating Liquors: INJUNCTION: CONTEMPT. A decree enjoining defendant from illegally selling liquors in a certain building was not void, depriving the court of jurisdiction to punish for contempt, because reciting that defendant was not the owner of the premises during the time of such sales and that since that time the same had been sold and possession given.

Certiorari to Worth District Court.—HON. CLIFFORD P. SMITH, Judge.

THURSDAY, APRIL 14, 1904.*

THE plaintiff was adjudged guilty of contempt for the violation of a decree restraining him from the unlawful sale of intoxicating liquors. This is a *certiorari* proceeding to determine the validity of that decree.— *Dismissed*.

Cooper, Clemons & Lamb and *W. A. Willing*, for plaintiff.

Chas. W. Mullan, Attorney-General, and *Lawrence De Graff*, Assistant Attorney-General, for defendants.

SHERWIN, J.— An action was begun against the plaintiff herein for the September, 1896, term of the district court

* This and the following four cases are published out of chronological order by reason of application for rehearings.

of Worth county, charging him with the illegal sale of intoxicating liquors in a certain building located in the town of Grafton, in that county, and praying that he be restrained from continuing the nuisance. Notice of such action was duly served upon the plaintiff, and he appeared thereto and defended. At the January, 1897, term of said court, the case was finally heard, and a decree entered therein finding that the defendant, William Ohlrogg, was maintaining a nuisance on the premises described at the time suit was commenced, and perpetually enjoining him from continuing the same. The decree also stated that the defendant was not the owner of the premises during the time that he was using them for the illegal sale of liquors, and that "since said time the premises have been sold to J. H. Hovel, and possession thereof given." In September, 1902, information was filed charging the defendant, Ohlrogg, with contempt for the violation of the injunction. The evidence clearly establishes the fact that he maintained a nuisance in the building in question between the date of decree and the filing of the information, and the only question remaining for our determination is as to the validity of the decree enjoining him from so doing.

It is contended that because of the recital in the decree that at the time of the trial the premises had changed hands, and "possession thereof given," the decree was void, and had no restraining force or effect. If it be conceded, for the purpose of this case, that the decree may fairly be construed to hold that at its date the premises had in fact passed from the control of Ohlrogg, it does not follow that the injunction order was void. The court had jurisdiction of the parties and of the subject-matter, and when it was determined upon the trial in January, 1897, that the defendant was maintaining a nuisance in the building at the time the suit was brought, the court had the undoubted right to restrain him from continuing the same. If it had been made to appear that the nuisance had in fact been abated by the

defendant at the time of the trial, it would then have been a matter of discretion with the court to issue the injunction, or not; depending upon its conclusion as to the good faith of the party in so doing. *Judge v. Kribs, et al.*, 71 Iowa, 183. The record herein shows that a contract for the sale of the premises was made after the notice had been issued in the suit begun in 1896, and that, if there ever was in fact a change of possession thereof, it was not until after a temporary writ of injunction had been issued and served. Furthermore, it clearly appears that, notwithstanding such pretended sale and change of premises, the defendant was soon again caught dispensing liquor in the same building. The decree was not void absolutely, and, however irregular or erroneous, it was still in force and valid until set aside in direct proceedings. *Finch v. Hollenger*, 47 Iowa, 173; *McCrillis v. Harrison County*, 63 Iowa, 592; *Blanchard v. Ware*, 37 Iowa, 305. And when the court has jurisdiction of the parties and of the subject-matter and authority to make the order, the injunction must be obeyed, however erroneously made. *Jordon v. Circuit Court*, 69 Iowa, 177; *State v. Circuit Court*, 98 Wis. 143; 16 Am. & Eng. Enc. of Law, 438; and cases cited. The cases cited and relied upon by the plaintiff are not in conflict with this conclusion. There was no error in permitting an amendment to the information.

The judgment of the district court was right, and this proceeding is *dismissed*.

STATE OF IOWA V. RICHARD PRAY, Appellant.

Challenge to jurors. The appellate court will not presume prejudice
1 from the ruling of the trial court in excusing a juror because wrongly named; nor will prejudice arise from a refusal to excuse another from the same panel for the same reason, where the objection was not made until after the exercise of a peremptory challenge.

Waiver of objection to juror. An objection to a juror because of his
2 relation to the prosecuting witness in a criminal action, which
becomes known to defendant's counsel during the trial, is waived
by failure to call attention to the fact prior to the verdict.

Sequestration of Witnesses: DISCRETION OF COURT. It was not an
3 unreasonable exercise of discretion to permit the wife of a prosecuting
witness to testify, after remaining in the court room during the
examination of the other witnesses for the State, in violation of
a sequestration order, it appearing that the sheriff did not enforce
the order for the reason that she was the only lady witness.

Alibi: REASONABLE DOUBT: INSTRUCTIONS. An instruction that de-
4 fendant was not bound to establish an alibi beyond a reasonable
doubt, and if the testimony raised a reasonable doubt that defendant
was present at the commission of the crime he was entitled to an
acquittal, was not objectionable as leading the jury to believe
that it was only such doubt as to the alibi which would necessitate
acquittal, where the doctrine of reasonable doubt was correctly
stated in another instruction.

Reasonable doubt: REVIEW ON APPEAL. The appellate court will not
5 pass on the question of reasonable doubt in reviewing the evidence,
but if the verdict has support and the jury has been properly
instructed, its finding on the question is final.

Appeal from Decatur District Court.—HON. H. M.
TOWNER, Judge.

TUESDAY, JUNE 7, 1904.

CONVICTION. for arson. Defendant appeals.—*Affirmed.*

C. W. Hoffman, W. R. McGinniss, and G. W. Baker,
for appellant.

*Charles W. Mullan, Attorney-General, and Lawrence
De Graff, Assistant Attorney-General, for the State.*

MCCLAIN, J.—Defendant was convicted, on circumstantial
evidence, of having set fire at night to a livery barn in the town
of Grand Junction. It appears without question that, a short
time before the barn was discovered to be on

fire, the defendant had purchased a jug of kerosene oil at a grocery store not far away, and that he was seen going from the grocery store in the direction of the barn; that kerosene had been thrown on the side of the barn before it was ignited; and that a jug which had contained kerosene oil was found in the vicinity, which some witnesses testified was the same jug which defendant had had filled with oil at the grocery store. There was also some evidence tending to show a motive for the crime.

It is contended by the appellant that the trial court erred in refusing to direct a verdict for the defendant, and in refusing to set aside the verdict for the State on the ground of insufficiency of the evidence, and on the further ground that it was apparently the result of passion and prejudice. But the commission of the crime was clearly established, and there was some evidence tending to connect the defendant therewith. The sufficiency of the evidence was for the jury, and we have no disposition to interfere with their conclusions.

Complaint is made of the action of the court in impaneling the jury, first, because one juror was excused on challenge of the State, over defendant's objection, on the ground that he was incorrectly named; and, second, that defendant's challenge to another juror on the same ground was overruled. The first of these objections is not well taken, for the reason that we cannot presume prejudice from the ruling of the court excusing the juror. *Geiger v. Payne*, 102 Iowa, 581. It appears that the second objection was not made until after the counsel for defendant had waived a peremptory challenge, and there was therefore no prejudice to the defendant. *State v. Elliott*, 45 Iowa, 486.

One of the grounds of motion for a new trial which was overruled was that one of the jurors was related to the prosecuting witness, which fact was not divulged by the juror when examined during the impaneling of the jury. Their relationship was by a former marriage of the prosecuting

1. Anson: challenge to jurors.

witness to the first cousin of the juror. This marriage had been terminated twenty years before the trial

2. WAIVER OF OBJECTION TO JUROR.

by the death of the wife, but counsel for appellant contend that the survival of children of the marriage was sufficient to perpetuate the relationship between the prosecuting witness and the juror. Without passing on this question, it is sufficient to say that the trial court, in ruling on the motion, had before it a showing that counsel for the defendant became aware of the relationship soon after the commencement of the trial, and failed to make any objection to the continuance of the trial on that account, and that he expressed to others a willingness to allow the trial to proceed without raising any such objection. Counsel argue that the nature of the relationship did not come to the knowledge of counsel until after the commencement of the trial, but we think that if at any time during the trial, and before the verdict, counsel had information that there was some relationship which might disqualify the juror, he should have called the matter to the attention of the court, in order that the juror might be interrogated and the facts ascertained, and that, by failing to urge the objection or have an investigation made for the purpose of ascertaining whether such objection existed, the ground of complaint, whatever it might be, was waived. *Pfeiffer v. Dubuque* (Iowa), 94 N. W. Rep. 492; Bishop, New Criminal Procedure, sections 946, 947.

A number of errors are assigned as to rulings in the admission or exclusion of evidence, but, after examining the record, we reach the conclusion that the rulings were correct. It is not necessary, in our judgment, to discuss in detail the various objections, for they are as to minor matters, and do not reach the real merits of the case.

As to the objection that, after the trial court had directed the witnesses for the prosecution to be sequestered, one witness — the wife of the prosecutor — was allowed to testify, although she had remained in the court-room while

the other witnesses were, testifying, it is sufficient to say it appeared that the officer had not carried out the court's instructions as to confining this witness in a separate room with the other witnesses for the reason that she was the only woman among the witnesses, and the ruling of the court refusing to exclude the witness from testifying under the circumstances was fully within the exercise of a reasonable discretion.

Objection is made to one of the instructions which related to the evidence relied upon to establish an alibi, on the ground that under such instruction the jury were told that the defendant was not bound to establish such defense beyond a reasonable doubt, and, if the testimony raised in the minds of the jury a reasonable doubt that the defendant was present at the time and place of the commission of the crime, then it was their duty to give him the benefit of that doubt and acquit him. The objection is that by this instruction the jury might have been led to infer that it was only reasonable doubt raised by the evidence as to alibi that would necessitate an acquittal, but the doctrine of reasonable doubt as applied to the whole evidence was correctly stated in another instruction, so that the jury could not possibly have been misled.

Counsel urge that the evidence is not sufficient to establish the guilt of defendant beyond a reasonable doubt, but that is for the jury to say. We do not pass on the question of reasonable doubt in reviewing a case on the evidence. If there is competent evidence tending to support the verdict, and the jury have been properly instructed with reference to reasonable doubt, their verdict is final on that question.

Finding no error to have been committed, the judgment of the trial court is *affirmed*.

3. SEQUESTRA-
TION OF
WITNESSES:
discretion of
court.

4. ALIBI: rea-
sonable
doubt; in-
structions.

5. REASONABLE
DOUBT: review
on appeal.

B. A. DOLAN, Appellant, v. MIDLAND BLAST FURNACE CO.,
ET AL., Appellees.

Redemption from mortgage foreclosure: EQUITY: ACCOUNTING.

- 1 A mortgagor whose property has been sold on foreclosure, or his assignee, may maintain an equitable action to redeem if brought prior to the expiration of the statutory period of redemption; and where possession has been taken by the holder of the certificate of sale without assent he may have an accounting of the rents and profits and of any portion of the property converted by the certificate holder to his own use, for the purpose of ascertaining the amount required to make redemption.

Appeal: SUFFICIENCY OF NOTICE. The statement in an abstract that

- 2 appellant gave notice of appeal to defendant and the clerk of the court from which the appeal was taken, and secured his fees, is sufficient to confer jurisdiction over a simple statement in denial that the appeal was perfected as required by law and that the notice of appeal was insufficient.

Appeal from Lee District Court.—HON. HENRY BANK,
Judge.

SATURDAY, JUNE 11, 1904.

SUIT in equity to redeem certain property from an execution sale under the foreclosure of a mortgage. The trial court sustained a demurrer to the petition, and plaintiff appeals.—*Reversed.*

James H. Anderson, for appellant.

James A. Seddon and *H. Scott Howell & Son*, for appellees.

DEEMER, C. J.—Defendant Midland Blast Furnace Company held a mortgage upon the property in question, executed by the then owner, John Gaffney. This mortgage

was foreclosed by action in the superior court of the city of Keokuk, and a decree was rendered June 26, 1901. Transcript thereof was filed in the office of the clerk of the district court of Lee county, and the land was sold under special execution issued from that court on August 6, 1902, to the Midland Blast Furnace Company. This suit was commenced August 6th, and was originally brought to enjoin the issuance of a sheriff's certificate or deed, and for the purpose of effectuating an equitable redemption. Plaintiff also asked judgment not only against the furnace company, but also against other defendants, for damages done to the property; claiming that he had purchased the equity of redemption from Gaffney, and that he was entitled to compensation for injuries done the property. On defendant's motion, he was compelled to strike certain allegations, claiming damages, from his petition, and to file a separate one therefor against the other defendants. Thereafter he amended his bill by reciting that after the execution sale, and before the expiration of the statutory period of redemption, the Midland Company, purchaser of the property, went upon the land, and took therefrom a large amount of fixtures and machinery, and converted to its own use more than sufficient to pay the debt due it, and that, by reason of that fact, plaintiff was entitled to have the certificate of sale and deed set aside and canceled, and the property declared to be his, free and clear of the incumbrance. To this petition the Blast Furnace Company demurred, and its demurrer was sustained.

This appeal is from that ruling, and the question is whether or not the mortgagor, or his assignee or grantee, may have an equitable action for redemption, and an ac-

1. REDEMPTION
FROM MORT-
GAGE FORE-
CLOSURE:
equity; ac-
counting.

counting from the holder of the certificate of sale, who has despoiled the property, and converted enough of it to his own use to satisfy any claim he may have under his certificate.

Plaintiff has not, of course, effected a statutory redemp-

tion. Indeed, he has not undertaken to do so. And defendant insists that, as he did not do so, he cannot come into court to enforce any supposed equitable right. On the other hand, it is argued that the holder of a sheriff's certificate of sale has nothing more than a lien upon the land for the amount of his investment; that he is not entitled to the possession of the property until he receives his deed, and that if he goes into possession, commits waste, receives the rents and profits, or converts any of the property to his own use, he is liable to be held to account therefor in an equitable action to redeem; and that, if he has received from the property more than enough to satisfy his claim, his deed and certificate of sale should be canceled.

Under our authorities, it must be conceded that the holder of a sheriff's certificate of sale under a mortgage foreclosure is not entitled to the possession of the property, nor has he any title to the lands covered thereby. At most he has nothing more than a lien, or perhaps an inchoate or conditional right to an estate. The mortgagor and his grantee hold the legal title until divested by a sheriff's deed. In other words the mortgagor's title is not extinguished until that time. He or his grantee had until the sale under the foreclosure decree, an equitable right of redemption, and after the sale under that decree a statutory right of redemption. Either of these rights will be recognized, enforced and protected by a court of equity. See, as supporting these views, *Greenlee v. Mercantile Ins. Co.*, 102 Iowa, 427; *Varnum v. Winslow*, 106 Iowa, 287, and cases cited.

It is also true that, under our holdings, a right of redemption is said to be statutory, and must be exercised in the manner pointed out by statute. *Case v. Fry*, 91 Iowa, 138; *Williams v. Dickerson*, 66 Iowa, 106; *Lombard v. Gregory*, 90 Iowa, 684. Although it has also been held that, as to a junior lienholder, not made a party to a mortgage foreclosure, he has an equitable right of redemption, independent of the statutory one, which may be exercised

notwithstanding the statute. In one of the cases so holding it is said, in substance, that the equitable right of redemption which exists independent of statute will be enforced until taken away by express statutory enactment. *Spurgin v. Adamson*, 62 Iowa, 661; *American Co. v. Burlington Ass'n*, 61 Iowa, 464.

Which of these principles is to govern here? Has a mortgagor, or his grantee, whose property has been sold at foreclosure sale, no remedy against a certificate holder who takes possession of and despoils the property during the year for redemption, but to make statutory redemption, and thereafter to bring suit against the despoiler to recover the damages done to the estate? Appellees' counsel answer these interrogatories in the affirmative, and ask us to so hold. While there is much to be said in favor of his position, we do not think that equity is impotent under such circumstance. Had plaintiff allowed the statutory period of redemption to expire without taking any action to secure the fruits thereof, he would, of course, be without remedy, for the title to the land would have passed from him through the sheriff's deed. But in this case the action was brought before the expiration of the statutory period. It is for an accounting, and to determine the amount plaintiff should pay in order to secure the relinquishment of the lien held by the Midland Blast Furnace Company. Doubtless plaintiff might have made statutory redemption without waiving his right to recover damages done the estate by the certificate holder, but the pivotal question here is, was he bound to do so, under the facts conceded by the demurrer? When a mortgagee takes possession of land, he is ordinarily compelled to account for the rents and profits arising therefrom, and the mortgagor may bring an action for an accounting, and to establish the amount he should pay in order to discharge the lien of the mortgage. The holder of a certificate of purchase during the statutory period of redemption has little, if anything, more than a lien upon the property,

which is subject to be divested at any time by the payment of the amount of his purchase, with interest, costs, etc. When he has received that amount, his lien ceases.

Appellee practically concedes that if plaintiff had paid the amount invested by the certificate holder, although not in strict conformity to the redemption statutes, he would be entitled to maintain this suit. But he says there was no payment here, and therefore a court of equity has no jurisdiction. He is right, of course, in saying that there has been no payment, as we ordinarily understand that term. But is that fact determinative of the question of the jurisdiction of a court of equity? We think not. The reason why he might maintain the action in the one case, and not in the other, is not plain. Indeed, we think that in either case he may resort to a court of chancery for relief. In the one case he has voluntarily parted with his money for the purpose of extinguishing the lien, while in the other the property, or a part of it, covered by the lien, has been taken without his consent and converted to the use of the lienholder. It is no hardship on the lienholder to say that he must account for what he has received from the property while he held merely a lien thereon, and that it is an idle ceremony to require the mortgagor or his grantee to pay over his money, and then to bring suit to recover the same back again. One of the purposes of equity is to avoid and prevent a multiplicity of suits, and to hinder circuitry of action.

So far as we can discover, this exact question has never before been raised in this State, although we have decisions which, to our minds, in principle, sustain the right of action. Thus, in *Bitzer v. Becke*, 120 Iowa, 66, plaintiff, a landowner, was permitted to make redemption from a tax sale in an equitable action to determine the amount of taxes which might properly be assessed and levied against his land. In that case the power of a court of equity to effectuate justice in the redemption of lands from tax sale was

fully considered, and it was said, "Equitable circumstances no matter how new or complicated, may justify a court of equity in extending the time to redeem beyond the statutory period." It is important, we think, to distinguish between the right of redemption given by statute and the equity of redemption. Of course, the equity may be cut off by foreclosure. Indeed, that is the very object of the proceedings. But it is not cut off, under our statutes, until the expiration of the period allowed by law, and not then if equitable circumstances intervene which would justify the interposition of a chancellor. This is illustrated to some extent by *Mayer v. Farmers' Bank*, 44 Iowa, 212. Looking to the authorities from other States, it appears that such actions have been sustained, and that an accounting has been had not only for rents and profits, but also for waste committed on the property. *Givens v. McCalmont*, 4 Watts, 460; *Seuver v. Durant*, 39 Vt. 103; *Onderdonk v. Gray*, 19 N. J. Eq. 65. Prof. Pomeroy, in his work on Equity Jurisprudence, vol. 3 (2d Ed.) sections 1190, 1218, 1219, gives countenance to these doctrines. *Horn v. Indianapolis Bank*, 125 Ind. Sup. 381 (25 N. E. Rep. 558, 9 L. R. A. 676, 21 Am. St. Rep. 231), also supports the conclusions reached.

It must be remembered that this action was commenced before the statutory period of redemption had expired, and that plaintiff offered to pay whatever amount it should be adjudged on an accounting was due the certificate holder. It may be that a sale under foreclosure cuts off the equity of redemption of the mortgagor, and that his rights thereafter are statutory; yet it does not follow that equity will not grant relief, and refuse to call the certificate holder to an accounting. Such holder has no right to the possession of the property until the expiration of the statutory period of redemption. If he takes possession without the assent of the redemptioner, receives the rents and profits, or converts the property, or some part thereof, to his own use, we think

he should be compelled to account therefor in an action in equity to determine just how much the mortgagor must pay to remove the lien from his land. The authorities upon the question are not numerous, but we think that the rule here adopted is sound in principle and sustained by the adjudications.

II. Appellee argues that the case should be dismissed for want of jurisdiction. This contention is bottomed upon insufficiency of the notice of appeal. The statement in the abstract is that "appellant gave notice of appeal to the Supreme Court to defendants and to the clerk of the district court of Lee county, Iowa, at Keokuk, in which said court the case was heard, and secured the clerk his fees." In an amendment to the abstract appellee denied that appellant had ever perfected his appeal in the manner required by law, and stated that the alleged notice of appeal was wholly insufficient to give this court jurisdiction. He did not set out the alleged notice, nor did he make any other denials than the one quoted. From the argument, we discover that the points relied upon are that it is not stated in the abstract that the notice was in writing, nor that the appeal was from any order or judgment of the court, nor that the notice was served as required by law. None of these points are tenable. *Day v. Hawkeye Co.*, 72 Iowa, 597; *Augustine v. McDowell*, 120 Iowa, 401. *Merrill v. Timbrell*, 95 N. W. Rep. 237, relied upon by appellee, is not an authority. In that case a rehearing was granted, and a contrary result reached. See same case in 123 Iowa, 375. Appellee's denial is not sufficiently specific to require a certification of the record. The first part of it is a mere conclusion, and the second practically admits the service of a notice of appeal, but questions its sufficiency to give us jurisdiction. In this state of the record, we need only consider the statements made in the abstract. Jurisdiction appears.

But for the error pointed out in the first division of

this opinion, the ruling sustaining the demurrer must be, and it is, *reversed*.

L. SCHOONOVER v. J. F. PETCINA, COUNTY TREASURER OF JONES COUNTY, Appellant.

Taxation: OMITTED PROPERTY: NOTICE OF ASSESSMENT. Notice to a
1 taxpayer of the proposed assessment of omitted property must be
given within five years from the date at which the same should
have been assessed, or the same will be barred by the statute.

Assessment of omitted property: ISSUES ON- APPEAL. Where an as-
2 sessment of omitted property has been made and an appeal taken,
it becomes the duty of the court to inquire into and determine
de novo from all the evidence the liability for the assessment;
and an unverified statement of omitted taxes prepared by agents of
the county, employed to discover the same and the assessment
thereof, does not make a *prima facie* case for the county requiring
the taxpayer to show that specific items were erroneously listed.

Objection to assessment: SUFFICIENCY. No formal pleadings are
3 required in a proceeding to assess omitted property, and a tax-
payer's general objection to an assessment, made before the treas-
urer, that the items of moneys and credits proposed to be assessed
were not items for which he was liable for the years specified, and
that his indebtedness for those years which he was entitled to set
off against the same was equal to the amount of his moneys and
credits, was sufficiently specific to raise the issue on appeal.

Appeal from assessment: ISSUES. The issue on appeal from an as-
4 sessment of omitted property is the correctness of the action of the
taxing officer and the evidence must be confined to that issue, but
the taxpayer is entitled to have every question determined anew
which such officer was called upon to determine.

Taxation of bank securities. Where the owner of a private banking
5 business sold and transferred the business and assets to a national
bank of which he became a stockholder and its president, the notes
and other evidences of indebtedness so transferred became the
property of the national bank from the time of the transfer, and
was no longer taxable to the assignor.

Same: ESTOPPEL. Where the president of a national bank loaned bank
6 money on real estate security in his own name, thereafter assigning
the notes only to the bank, the mortgages securing the same were
not taxable to such president as moneys and credits; nor was he

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| 126 | 261 |
| 129 | 532 |
| 126 | 261 |
| 131 | 613 |
| 124 | 261 |
| 138 | 587 |

estopped from claiming that the same were bank property because the transaction amounted to an evasion of the federal banking law.

Taxation of contracts: WHAT CONSTITUTES A CREDIT. Where one
7 purchases land, paying therefor and taking title in his own name, and in accordance with a previous understanding enters into a contract of lease for a rental based upon an interest rate on his investment, giving to the lessee an option to purchase the same within a specified time upon payment of its cost to the lessor, the transaction does not amount to a contract giving rise to any actual indebtedness which is assessable as a credit.

Estoppel: SHOWING OF INDEBTEDNESS. Where the assessment rolls
8 inform a taxpayer that he need only list such liabilities as he desires to offset against his moneys and credits, he is not estopped in a proceeding to assess omitted property, from making an itemized statement of his indebtedness for each year, for the purpose of showing a larger amount than contained in the assessment rolls.

Deduction of debts: WHAT CONSTITUTES A DEBT. An obligation
9 which a taxpayer may deduct from the amount of his moneys and credits under Code, section 1311, must be an actual indebtedness, and notes signed simply as an indorser which were reported to the comptroller of currency by such indorser, do not constitute such indebtedness.

Reply: ARGUMENT: COSTS. Where the appellee had the opening argu-
10 ment, and the appellant in his reply brief failed to discuss any matters not sufficiently presented in appellee's opening argument, to enable a full response in appellant's main argument, the costs of the reply should be taxed to him.

Appeal from Jones District Court.—HON. W. G. THOMP-
SON, Judge.

WEDNESDAY, JULY 13, 1904.

PLAINTIFF was assessed by the county treasurer under chapter 50, page 33, Acts Twenty-eighth General Assembly, on moneys and credits claimed to have been omitted from assessment for preceding years. On appeal to the district court this assessment was set aside, and the defendant appeals to this court.—*Reversed.*

E. E. Reed, County Attorney, and *Baily & Stipp*, for appellant.

F. O. Ellison and Cash & Rhinehart, for appellee.

McCLAIN, J.—Notice was given to plaintiff by the treasurer on August 22, 1902, that moneys and credits which should have been assessed to him for the years 1897, 1898, 1899, 1900, and 1901 had been either withheld, overlooked, or omitted from assessment, and had not been listed or assessed for said years. As the assessment for 1897 should have been made before April 1st, the five-year limitation had run with reference to any omissions for that year. *Siberling v. Crop-per*, 119 Iowa, 420; *Thornburg v. Cardell*, 123 Iowa, 313.

The notice given by the treasurer advised plaintiff only as to the aggregate sums of moneys and credits which it was claimed had been withheld, overlooked, or omitted for the respective years, and required him to appear on the third day of September at the office of the treasurer, to make objections to the listing and assessment of said property for taxation for said years, respectively. The amounts of moneys and credits specified for the respective years as omitted or overlooked were, however, those stated in a report made to the treasurer by the National Accounting Company, which showed in condensed and tabulated form a large number of items, designated by date, amount, volume and page of the records, and an abbreviated description. At the end of this tabulated statement, which occupies nine pages of printed record, was a summary showing the total amounts for the respective years, and these were the amounts specified by the treasurer in the notice.

The first claim of appellant which we need consider is that this tabulated statement and the action of the treasurer in assessing the amount specified therein for the respective years made out a *prima facie* case against the plaintiff, and that he should have been relieved by the district court from such assessment only in so far as he introduced evidence explaining specific items,

1. OMITTED
PROPERTY:
notice of
assessment.

2. ASSESSMENT
OF OMITTED
PROPERTY:
issues on
appeal.

and showing that they were not properly included in the list of his moneys and credits. But this is not the construction which has been put upon statutory provisions allowing an appeal to the district court with reference to an assessment. On such appeal the court is to hear the matter in equity, and determine anew all questions arising before the taxing officer or tribunal which relate to the liability of the property to assessment or the amount thereof. See Code, section 1373. The matter stood before the district court in the same situation as before the treasurer, and it was for the court to determine whether or not the plaintiff was liable to assessment for the moneys and credits with which the treasurer had assessed him. It is to be noticed that the treasurer did not act upon the return made by a sworn officer, but upon the return of a company employed by the county for the purpose of discovering moneys and credits which had been overlooked, and certainly such a report cannot be regarded as a public record, which must be presumed to be correct. It is not pretended that the treasurer made any independent investigation or finding as to the correctness of the report, and we think it was for the district court to determine on all the evidence whether any moneys and credits had been omitted in previous assessments, and the total amount of such moneys and credits thus overlooked or omitted on which the plaintiff should be required to pay taxes. See *Grimes v. Burlington*, 74 Iowa, 125; *Lyons v. Board of Equalization*, 102 Iowa, 1; *City Council v. National Loan, etc., Co.*, 122 Iowa, 629.

It has been held in *Frost v. Board of Review*, 114 Iowa, 103, that the court cannot be converted into an original taxing tribunal, but can only review an assessment made. What was there said was only said, however, with reference to a case in which no assessment was brought before the court for review. Here we have an assessment made by the treasurer, and evidence received as to its correctness, and we think the court was required, under the statute, to determine the question whether the assessment was such as the treasurer

ought to have made in view of the evidence before the court, and to fix the amount of moneys and credits for which the plaintiff should have been assessed by the treasurer.

It is further contended for appellant that no objections to the assessment by the treasurer could be considered on an appeal to the district court which were not specifically presented on the hearing before the treasurer, and

3. OBJECTION TO ASSESSMENT: sufficiency. that the objections made before the treasurer by plaintiff were too indefinite and uncertain

to raise any question for his consideration. But no formal pleadings are required in such a case, and we think the allegation that the items of moneys and credits scheduled and proposed to be listed and assessed to him were not items for which he was liable to assessment for the years specified, and that during those years his indebtedness which should be deducted from his moneys and credits was sufficient in amount to offset the total amount of moneys and credits for which he was subject to assessment for those years, was a sufficiently specific objection to raise an issue, and that the issue thus raised could be tried on appeal to the district court. The requirement of chapter 50, page 33, Acts Twenty-eighth, General Assembly, is that the person to whom it is proposed to list and assess omitted property under the provisions of that act shall have notice "of the time and place where objection to such proposed listing and assessment may be made"; and when such person has made objection, and has nevertheless been assessed, he is authorized to appeal to the district court, and have the correctness of the assessment determined on evidence presented. The treasurer, when acting with reference to the assessment of property, is not a judicial officer, and the ordinary rules of pleading and evidence applicable to the trial of a case in court need not, and, indeed, could not be followed in the proceeding before him. The plaintiff was entitled on his appeal to have determined every question which the treasurer was called upon to determine with reference to the liability of the plaintiff to assessment

on moneys and credits for the years specified. *Burns v. McNally*, 90 Iowa, 436.

The issue before the district court on such appeal is as to the correctness of the action of the assessing officer or tribunal, and the evidence must be confined to that question.

But when the evidence is submitted it is for the court to determine on the whole evidence

4. APPEAL FROM
ASSESSMENT:
ISSUES.

whether the officer or tribunal has acted properly, and if, as to any items included by the assessment officer or tribunal, it appears that the taxpayer was not liable to assessment, then the district court should reduce the assessment accordingly; and if it finds that under the evidence no assessment should have been made, it should set aside *in toto* the assessment complained of. It appears that plaintiff submitted to the district court a tabulated list of his moneys and credits subject to taxation for the years in controversy, and of his liabilities, which he claims should be set off as against such moneys and credits; and this list, as he testified, was correct. The court was justified in considering this testimony in connection with the list of moneys and credits returned by the National Accounting Company, and such evidence as was introduced as to the correctness of specific items in either of the two lists, and to determine from all the evidence before it whether plaintiff was subject to assessment for any moneys and credits for the respective years for which he had not been properly assessed.

Counsel on either side have grouped the controverted items into classes, and we shall proceed to consider the liability of plaintiff to assessment for each of these classes of items. It appears that in 1897 plaintiff, who

5. TAXATION OF
BANK SECUR-
ITIES.

had prior to that time been engaged in a private banking business, sold this business to a corporation, then organized under the national banking law, known as the Anamosa National Bank, in which he subsequently acquired eighty-five shares of stock, and of which he became president. He transferred to the new bank the assets

of his private bank, including the notes and other evidences of indebtedness held by him in connection with such banking business, and such assets became from that time on assets of the national bank, and no longer taxable as moneys and credits of the plaintiff. It is clear that any items of moneys and credits included among the assets thus transferred were improperly listed for taxation to plaintiff.

After the organization of the Anamosa National Bank, which, under the national banking law, was not authorized to loan money on real estate securities, plaintiff, as its president, was in the habit of taking notes in his own name, secured by real estate mortgages, for money loaned, and transferring the notes, with his indorsement, to the bank, holding the mortgages in his own name; and it appears that with his consent other officers of the bank acted for him in similar transactions, so that the bank held a large amount of notes taken in the name of the plaintiff and indorsed to the bank, secured in this manner, so far as plaintiff was concerned, by real estate mortgages. These mortgages were included in the list of items of moneys and credits assessed by the treasurer to the plaintiff, and it is argued for appellant that they were properly so included, for the reason that plaintiff is estopped from claiming that transactions which were in reality an evasion of the prohibition of the federal banking law as to loaning money on real estate security, in which he had acquiesced as an officer of the bank, were so far valid as to relieve him from liability for taxation on the loans thus made. But it has been held by the Supreme Court of the United States that national banks may enforce such notes, and even avail themselves of the real estate securities given to the indorsers, and that it is only for the United States, and not for the debtor, to say that such a transaction is fraudulent, and in violation of law. *National Bank v. Matthews*, 98 U. S. 621 (25 L. Ed. 188); *National Bank v. Whitney*, 103 U. S. 99 (26 L. Ed. 443);

a. SAME:
estoppel.

Fortier v. New Orleans Bank, 112 U. S. 439 (5 Sup. Ct. 234, 28 L. Ed. 764).

It is not claimed that the notes thus transferred by plaintiff to the bank were not treated as a part of its assets in the payment of its taxes, and we see no reason why the plaintiff may not now properly contend that these notes were the property of the bank, and not his property. In fact, we see nothing in the national banking law to prevent the sale to a national bank of a note secured by a mortgage on real estate. Even if the bank were forbidden to enforce the mortgage, the note, as distinct from the mortgage, would be a negotiable instrument, subject to transfer by indorsement. By such a transfer the indorser would incur a qualified liability to the bank, but such liability would be collateral only, and not direct. Even though plaintiff, by means of such transfers, became an indorser to the extent of more than one-tenth of the capital stock of the bank, we hardly think that he thereby became a borrower to that extent, in violation of the provision of the federal banking act prohibiting the loan to any one officer of sums greater than one-tenth of the capital stock. But, even if he is to be treated as a borrower with reference to the sums of the notes thus transferred, he could not himself set up the violation of this prohibition as a defense, *Gold Mining Co. v. National Bank*, 96 U. S. 640 (24 L. Ed. 648), and we do not see how the statutory prohibition affects the question as to his liability to taxation for the notes thus transferred, and which the bank became entitled to enforce, not only as against the makers, but also as against plaintiff as indorser. In short, these notes became for all practical purposes the property of the bank, and plaintiff's liability thereon was collateral only, and we do not see how plaintiff can properly be assessed for such notes as moneys and credits.

Certain items listed by the National Accounting Company as "land contracts" refer, as it appears, to certain warranty deeds executed to plaintiff, which, on the face of

them, do not indicate any indebtedness to plaintiff what-
 7. TAXATION OF ever on the part of any person; certainly not
 CONTRACTS: on the part of the person whose name is signed
 what consti- to the deed. But it was shown on behalf of
 tutes a credit. defendant that in some cases plaintiff, at the request of per-
 sons desiring to buy particular tracts of land, had taken
 conveyances of the land from the owner to himself, and then
 executed leases to the persons desiring to purchase, fixing
 the rental price of the premises at an amount determined by
 some agreed rate of interest on the amount of money invested
 by him, with provisions in the leases that the tenants might
 become purchaser within periods specified in such leases
 upon payment of stipulated amounts, which were in fact
 the amounts invested by plaintiff in the premises.

It is claimed by appellant that these instruments were
 in fact mortgages to plaintiff of lands really belonging to
 the persons for whom they were thus purchased, and that
 these transactions, therefore, were resorted to for the purpose
 of evading taxation. It is apparent, however, that before
 the plaintiff can be taxed for an indebtedness as involved in
 such a transaction, it must appear that there was in reality
 a debt. The deeds and leases do not show any indebtedness
 from the tenants to the plaintiff, but only a privilege of pur-
 chase which the tenants might avail themselves of if they
 should see fit at any time during the terms of their leases.
 It appears from the evidence that in some instances the ten-
 ants had availed themselves of these options and become pur-
 chasers of the lands covered by the leases from the plaintiff
 and received deeds therefor. In other instances it appears
 from the testimony of the tenants themselves that the trans-
 action in each case was just what it purported to be on its
 face—a purchase of land by plaintiff, with the expecta-
 tion of selling such land to the person at whose request the
 purchase was made, with an agreement for rent in the mean-
 time, which should be equivalent in amount to interest on
 the investment. If plaintiff had sufficient confidence in the

value of the land purchased and in the probability of the tenant becoming a purchaser to enter into such an arrangement, we see no reason why he should not do so. Nor is there anything in such a transaction so unbusinesslike or unreasonable as to arouse suspicion. If the tenant should not exercise his option, plaintiff would still be the owner of the land, and could dispose of it to some other purchaser, and he would be entirely protected from loss, unless, of course, the land should depreciate in value. Apparently that is the only risk which he took, and it was a legitimate risk in connection with the ownership of the property. We find no evidence that in a single instance there was any actual indebtedness in connection with these land transactions which could be assessed to plaintiff as a credit which were not so reported in his list furnished to the court in connection with his testimony. As it does not appear, therefore, that in any of the cases investigated by the court there was such a contract for the sale of land as to give rise to an indebtedness to plaintiff, we reach the conclusion that the items entered by the National Accounting Company as land contracts were not items which should have been taken into account by the lower court in determining the amount of plaintiff's moneys and credits. The case differs in this respect from *Perrine v. Jacobs*, 64 Iowa, 79, and *Meyer v. Dubuque County*, 49 Iowa, 193.

It appears in two instances that the tenant had before the purchase of the land by plaintiff made part payment to the former owner, but in these cases the tenant allowed the plaintiff, on paying the balance of the purchase price, to take a warranty deed for the premises, accepting a lease for five years, with rent fixed with reference to interest on the amount of money advanced by plaintiff, and with an option to purchase on payment of that amount. So far as we can see, the tenants in these cases would have lost the amount of money which they had paid the previous owner had they failed to avail themselves of their options within the terms fixed in their leases. But if they saw fit to put themselves

in this position, depending on their ability to exercise the option given them, we cannot see that the transaction can be regarded as an evasion of taxation. The land was, of course, taxed at its full value, and there was no indebtedness to the plaintiff which can properly be listed as a part of his moneys and credits.

The classes of cases which have been discussed include the larger part of the items which were by the National Accounting Company reported as moneys and credits omitted from taxation. There are, however, some other items included in the list, and not reported by the plaintiff to the court as credits, which are not thus explained; but plaintiff, as a witness, went over these items one by one, and, so far as we can discover, made reasonable explanation of all of them, showing that they were not properly listed as against him as credits. His testimony as to these items is in no way contradicted, and we reach the conclusion that he was not subject to taxation for any moneys and credits not included in the list furnished by him to the court, save that to the amounts of credits reported by him for each year should be added the value of his bank stock. This bank stock had been included in the regular assessments, and he had paid taxes on the amount of such stock and such other credits as were assessed to him in those years, after deducting the amount of his claimed indebtedness. For the purposes of the present computation, it will be more convenient, however, to add to the moneys and credits reported by him to the court the value of his bank stock as found by the assessor for each year, and thus arrive at the total amount of moneys and credits for which he should have been taxed for each year. This will be more convenient for the reason that his showing as to his indebtedness for each of these years is different from that made to the assessor in connection with his regular assessment.

We now reach the question of the indebtedness which plaintiff is entitled to set off for each year as against his mon-

eyes and credits. Counsel for appellant contend that he is concluded by his report of indebtedness for each year to the assessor, and cannot now claim a larger amount of indebtedness for the purpose of offsetting the larger amount of moneys and credits now shown. But it does not appear that plaintiff made any itemized statement of indebtedness for these respective years. He was notified on the assessment rolls that "the party assessed need list only such of his liabilities as he may desire to have subtracted from his moneys and credits," and we think that he is not now estopped from making an itemized statement of indebtedness for each year, and thereby showing a larger amount of indebtedness than that mentioned on the assessment rolls.

In his report to the court, which, it must be understood, was made under oath, he itemized his indebtedness for each year, and there is no evidence that any of the items given are not true and correct statements of liabilities which he is entitled to offset against moneys and credits, save that for each year he includes liability to the Anamosa National Bank on notes. So far as plaintiff shows, this liability was as indorser only on notes transferred from his private banking business to the national bank, or taken in his own name and transferred to the bank. As the reports of the bank to the Comptroller of the Currency, which plaintiff signed, certify that the bank owned no notes or securities in any of these years which were not good, we must assume that plaintiff's liability as indorser was not a real liability within the provisions of Code, section 1311, which authorizes the taxpayer to deduct from the actual value of his moneys and credits the gross amounts of all debts in good faith owing by him, with the limitation that "no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of this section, and so much only of any liability of

8. ESTOPPEL:
showing of
indebtedness.

9. DEDUCTION OF
DEBTS: what
constitutes a
debt.

such person as security for another shall be deducted as he believes he will be compelled to pay on account of the inability of the principal debtor." We are justified, therefore, in excluding from the list of plaintiff's liabilities any liability by reason of the indorsements on these notes.

Plaintiff also lists among his liabilities, for the purpose of offsetting the moneys and credits returned by the National Accounting Company, the moneys and credits on which he has already been taxed; but these items we exclude, as they will be deducted in another manner. Taking, then, the moneys and credits reported by the plaintiff to the court as the true amount of his moneys and credits not previously taxed, adding thereto his bank stock, which constituted substantially the moneys and credits on which he had already been taxed, and deducting from the totals for each year his indebtedness for that year, as shown by his report, excluding items already referred to, we find that plaintiff should have been taxed on moneys and credits as follows: For 1898, \$10,710; for 1899, \$28,836; for 1900, \$11,647; for 1901, \$27,443. He was in fact taxed for moneys and credits, after deducting liabilities, as follows: For 1898, \$10,000; for 1899, \$19,292; for 1900, \$8,968; for 1901, \$9,436. It appears, therefore, that the moneys and credits for which the lower court should have approved assessments against plaintiff were as follows: For 1898, \$710; for 1899, \$9,544; for 1900, \$2,679; for 1901, \$18,007.

A motion is submitted with the case to strike out appellant's argument on the ground that, as this is an equity case, the appellee, having filed the first argument, was entitled to close, and appellant's reply was filed without right under the rules, and it is asked that the costs of the reply be taxed to the appellant.

10. REPLY ARGUMENT: COSTS.

On examination of the reply it appears that counsel have not discussed any matters which were not sufficiently presented in appellee's opening argument to enable them to respond fully in their main argument, and the costs of the reply

should therefore be taxed to the appellant. The other costs of this appeal will be taxed to appellee.

The case is remanded to the lower court, with direction that the amounts above found to be the assessable value of omitted moneys and credits of plaintiff be certified to the treasurer to be listed for taxation under the provisions of Code, section 1374, and Acts Twenty-eighth General Assembly, page 33, chapter 50.—*Reversed.*

CONTINENTAL INSURANCE Co., Appellant, v. CLARK & CRESSLER, Appellees.

Fire insurance: WRONGFUL ISSUANCE OF POLICY: LIABILITY OF AGENT.

- 1 Where insurance agents with authority to issue policies, fraudulently and negligently issue one in direct violation of the company's instructions and purposely fail to report the risk, the company may recover of the agents in case of loss, the damage sustained by reason of such disobedience.

Fraud: LIABILITY OF AGENT: DEFENSES. The fact that an insurance

- 2 company did not have sufficient time after the issuance of a policy to avail itself of a provision for cancellation prior to a loss, was not a defense available to its agent in an action against him for the fraudulent issuance of the policy.

Estoppel. An estoppel must be pleaded.

3

Dismissal of actions: RATIFICATION: ESTOPPEL. The denial of a

- 4 count of the petition, tender of the amount claimed and offer to confess judgment therefor, which are refused, will not preclude the right of plaintiff to dismiss as to that count at any time before judgment; nor will it amount to a ratification or work an estoppel.

Damages: EVIDENCE. Where it appeared that the agents of an insur-

- 5 ance company recommended the payment of a loss in full, the amount of the adjustment was competent evidence of the company's loss in an action against the agents for the wrongful issuance of the policy.

Negligence: PLEADINGS. Where an action was bottomed on negli-

- 6 gence and the wrong was willful, the petition need not negative contributory negligence.

Liability of agent: MEASURE OF DAMAGES. In an action against an insurance agent for wrongfully writing a risk at a lower rate than authorized and failing to report the same, and the evidence tended to show that the company would have cancelled the risk had it known of it, the measure of damages is the total loss sustained thereby.

Appeal from Green District Court.—HON. Z. A. CHURCH,
Judge.

WEDNESDAY, JULY 13, 1904.

ACTION at law to recover the amount paid by plaintiffs on a policy of insurance issued by the defendants as its agents, on the ground that defendants issued the policy without authority, and willfully and fraudulently failed to follow their instructions. Trial to a jury. Directed verdict for defendants, and plaintiff appeals.—*Reversed.*

Edmund H. McVey and Howard & Howard, for appellant

Wilson & Albert and Clark & Cressler, for appellees.

DEEMER, C. J.—In the year 1898 defendants Clark & Cressler were appointed agents of plaintiff fire insurance company for the town of Scranton, in Green county, with authority to issue policies. They were required to make daily reports of all policies issued, or, in case they could not be sent out on the very day, were required to send a short letter giving the principal particulars of the risk. On August 6, 1900, they issued a policy of insurance in the plaintiff company to Lower Bros. for the sum of \$1,000, covering a stock of hardware and implements in a frame building at Scranton, at the rate of 2½ per cent. Some correspondence followed the receipt of the daily report of this risk, which resulted in a letter from plaintiff to defendants which closed as follows: "For our part we do not desire to write it at

any such ridiculously low rate. Three and one-half per cent. is low, and two and one-half per cent. is prohibitive, and any company that will accept this class of business at such rate must necessarily come out in the end a heavy loser, as the experience of all old companies shows that this class of business written at these rates must necessarily operate to their great loss, if followed to any extent. We will thank you therefore to take up and return policy No. 1,029 to this office at once upon receipt of this letter or advance the rate to three and one-half per cent. In either event we desire your immediate action." Pursuant to this letter, defendants wrote on the face of the policy: "Canceled pro rata, August 21st, 1900. Premium, \$24.00." They also returned the policy thus canceled to the plaintiff, in compliance with its instructions. On August 31, 1901, plaintiff received a telegram from B. O. Clark, and on the following day a letter; each advising it of a loss under a policy to Lower Bros. covering the same property, and written at the same rate as the canceled policy. Plaintiff thereupon investigated the loss, and finally paid Lower Bros. the sum of \$861.43 on account of the policy held by them. This policy was issued on August 24, 1901, contrary to instructions; and plaintiff had no notice thereof until advised of the fire, which occurred about eleven o'clock at night on August 29, 1901. This action is brought to recover the amount paid out on account of the loss, \$50 expenses in adjusting the same; and \$35, the amount of the premium which defendants should have exacted. These facts are all admitted, and, in addition thereto, plaintiff proved that defendant B. O. Clark was present when the loss was adjusted, and told the adjuster that plaintiff ought to pay the full amount of the policy. It also showed that, had it known of the issuance of this last policy before the fire, either through a daily report or otherwise, it would have canceled the policy by telegram.

At the conclusion of plaintiff's evidence, defendants filed a motion for a directed verdict, which was sustained, and

the appeal is from that ruling. Such being the record, we are to determine whether or not plaintiff made a *prima facie* case, entitling it to have the same submitted to a jury.

It should also be stated that after the commencement of the suit, and just as the case was called for trial, defendants made the tender of \$35 to the plaintiff — being the amount of the premium claimed in the petition — and also offered to confess judgment for that amount, with costs. Plaintiff refused to accept either the tender or the offer to confess. Nothing further was done with reference thereto until after the trial court had announced its ruling on the motion to direct, whereupon plaintiff asked to dismiss that count of its petition asking to recover the premium, but this the trial court would not permit.

It is conceded that the risk covered by the policy was not a prohibited one. That is to say, the agents had authority to write the policy, provided they exacted a proper rate.

1. WRONGFUL
ISSUANCE OF
POLICY: lia-
bility of
agent.

Had it been written for a three and one-half per cent. instead of a two and one-half per cent. premium, it would have been issued with au-

thority. Were this all there is to the case, the action of the trial court in directing a verdict, in view of defendants' offer to confess judgment, should not be disturbed. *State Insurance Company v. Richmond*, 71 Iowa, 519. But this is not the exact situation. Here there is a charge of fraud and bad faith on the part of the agents, which has support in the testimony offered by the plaintiff, and a further charge that defendants disobeyed instructions in the matter of daily reports, and fraudulently concealed from plaintiff the fact that it had issued the policy to Lower Bros.; that, had defendants notified it of the issuance of the policy, as required of them by its instructions, plaintiff would have canceled the same, and thus have escaped liability. There was evidence to sustain all these allegations, and we think the court was in error in directing a verdict for the defend-

ants, unless it be for some matters to which we shall presently refer.

If the defendants fraudulently and negligently issued the policy against the express direction of their principal, and continuously and purposely failed to make report thereof, and plaintiff, through this fraud, was compelled to pay a loss which it might have otherwise avoided, there is every reason for holding them liable not only for the premium they should have exacted, but also for the full amount of the damages suffered by it in consequence of defendants' willful wrong. In this respect the case is much like *State Ins. Co. v. Jamison*, 79 Iowa, 245. See also, *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409 (31 N. W. Rep. 454); *Kraber's Ex's v. Union Ins. Co.*, 129 Pa. 8 (18 Atl. Rep. 491); *Am. Cent. Co. v. Hagerty*, 21 Misc. Rep. 213 (45 N. Y. Supp. 617); *Sun Fire Co. v. Ermentrout*, 11 Pa. Co. Ct. R. 21. The question in such a case is not merely one of premium, but of defendants' liability for failure to follow instructions and for fraud, where the evidence shows or tends to show that, but for such fraud and wrong, the policy would not have become binding. The fundamental duty of an agent is to follow his instructions, and subject his will to that of his principal. If disobedience affects the manner of execution, and does not affect the result, doubtless no more than nominal damages may be recovered. But if it results in actual loss or injury to the principal, the latter may recover such damages as he can show he has sustained by reason of such disobedience. *Whitney v. Mercantile Co.*, 104 Mass. 152 (6 Am. Rep. 207); *Brown v. Arrott*, 6 Watts & S. 402; *Harvey v. Turner*, 4 Rawle, 233. These rules form the basis of distinction between the two Iowa cases cited *supra*.

II. To avoid this conclusion, defendants contend that as, by the terms of the policy, requiring the insurer to give the insured five days' notice of the cancellation of the policy, the instrument could not have been canceled by the plaintiff even if it had been notified of the issuance thereof

through daily reports or otherwise, plaintiff is in no position to demand the full amount of its loss. That provision was made for the benefit of the insured, and not for the defendants, and defendants cannot rely thereon for the purpose of escaping liability for their fraud and wrong. We are of opinion that no one can rely thereon but the person to whom the policy was issued. To permit defendants to assert this as a defense would allow them to advantage themselves of their own wrong. This, of course, they should not be permitted to do. If this were a suit to cancel the policy, a different rule might obtain, but such is not the situation. Moreover, the insured might have waived this provision of the policy, upon notification by the company of its desire to cancel. Indeed, it appears that very thing was done when the first policy was canceled.

III. They further argue that, as plaintiff brought suit for the \$35 premium on the policy, it elected to make the contract its own, and by so doing ratified the acts of its agents, and estopped itself from claiming damages. There is no plea of estoppel in the case. Hence the point need not be considered. Indeed, there is no pleading which in any manner presents this proposition. Even if there were, we do not think the proposition sound. There might have been an election of remedies which would be binding upon the plaintiff, but this is not pleaded; and in view of the fact that the petition counts upon fraud, violation of instructions, etc., with which is coupled a claim for the premium which should have been exacted, there was, under our holdings, no election in this case. *Smith v. Bricker*, 86 Iowa, 285. Perhaps plaintiff might have been required to elect on which cause of action it would proceed, but, as this point is not before us, we may well wait until it properly arises before discussing or deciding it.

The defendants denied all allegations with reference to this \$35 premium, but, as we have said, made a tender of this amount, and offered to confess judgment on the count in the

2. FRAUD: liability of agent; defenses.

3. ESTOPPEL.

petition asking for the same; but the plaintiff refused to accept either the tender or the offer to confess, and dismissed the same before any judgment was rendered thereon. Where one in a single petition pleads inconsistent matter, he is no more held to an election of one remedy than the other, for, in the absence of an election, it is impossible to say which one he really relies upon. If he, with full knowledge of the facts, brings suit to enforce a contract, and thereafter undertakes to rescind the same, it may be he should be held to an election of remedies and rights. This is certainly true when the first suit proceeds to judgment, but that is not the case here. Much the same line of reasoning applies to the doctrine of ratification and estoppel. Plaintiff did not receive the premium which the agents should have exacted, and before judgment was rendered therefor, which was against plaintiff's protest, it endeavored to dismiss that part of its claim, but the court would not allow it do so. This, we think, was error. Plaintiff had not accepted either the tender or the offer to confess. On the contrary, it had expressly refused to do so, and there is no room for the doctrine of ratification or estoppel. Defendants could not, by a tender or offer to confess which was not accepted, change their relations to the company. Could they do so, it would be very easy to defeat an action by a plea of ratification or estoppel.

IV. Further, it is contended that there is no proper proof of the amount of plaintiff's loss. This is bottomed on the proposition that defendants are not bound by the ad-

justment of the loss made by an agent of the company with the insured. It is sufficient to say in answer to this that one of the defendants, who was agent for the other — for they were in partnership in this business — advised and directed the adjuster to pay the full amount of the policy before any adjustment was made. This being true, there was sufficient evidence to take the case to the jury on this proposition. Moreover, we are inclined to

4. DISMISSAL OF
ACTIONS: rati-
fication; es-
toppel.

5. DAMAGES:
evidence.

the view that the adjustment, although made without defendants' knowledge or consent, was *prima facie* the true measure of recovery.

V. But one other point need be considered, and that is a claim made by defendants that plaintiff cannot recover because it failed to negative contributory negligence in its petition. The mere statement of the proposition sufficiently refutes the claim. The action is bottomed on defendants' failure, as agents, to obey the instructions of their principal, and upon fraud and willful wrong on their part. In such a case contributory negligence need not be negated. Call the action what you will — there is no requirement of law that contributory negligence be negated in such a case. Even if the gravamen of plaintiff's action be negligence, the wrong charged was a willful one, and in such cases contributory negligence need not be negated in the petition. *Ruter v. Foy*, 46 Iowa, 132; Beach, Contributory Negligence, section 640 *et seq.*; *Jones v. White*, 90 Ind. 257.

The close point in the case is the measure of damages. If merely nominal, then there should be no reversal; but if, on plaintiff's showing, compensatory damages might be allowed, then there should be a reversal, unless the damages to be awarded are simply the premium which defendants should have collected. Where the risk is not a prohibited one, the rule ordinarily is the difference between the rate received and the one that should have been collected, or, if the premium has not been paid, the full amount which should have been collected. But where the gist of the action is the failure of the agent to comply with his instructions to report the risk, and the evidence is sufficient to show that the principal would have canceled the policy, had it known thereof, then the true measure of recovery is the loss suffered by the principal. This is the holding in *State Ins. Co. v. Jamison*, *supra*; and with that we are content. The Richmond Case was decided

6. NEGLIGENCE:
pleadings.

7. LIABILITY OF
AGENT: measure
of damages.

upon a demurrer to an answer which recited that the agent acted in good faith, and there was no question regarding failure to follow instructions. Indeed, it appeared in that case that the rate of premium charged was greater than should have been exacted, and there was an express statement that the company would have accepted the risk, had it known of the true facts. Further, it was expressly averred that the agent violated no contract with his company, and that he had no instructions which were unobserved. That case is therefore exceptional.

Defendants were not called upon to disclose their real defense, and what we have said is based solely upon plaintiff's side of the controversy. On a retrial of the case, this thought should be remembered.

For the error in sustaining the motion to direct a verdict the judgment must be, and it is, *reversed*.

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, JANUARY TERM, A. D. 1905.
AND IN THE FIFTY-NINTH YEAR OF THE STATE.

THOMAS CONSIDINE V. CITY OF DUBUQUE, Appellant.

Defective sidewalks: CONTRIBUTORY NEGLIGENCE. One is not guilty
1 of contributory negligence as a matter of law in passing over
a defective walk rather than taking another way, where the defect
was not known to him.

Evidence: PHOTOGRAPHS. Where photographs of the condition of a
2 walk at the time and place of an injury are admissible in evidence,
their admission simply for the purpose of illustrating a claim in
argument, with a statement of the court that he would so instruct
the jury, which he overlooked, was not error.

Secondary evidence. Where the primary proof of notice to a city of
3 injury from a defective walk is shown to have been lost, secondary
evidence is admissible.

Exclusion of evidence. Where the ruling striking certain evidence
4 was plain, an instruction directing the jury not to consider the same was not objectionable as failing to point out the matter stricken.

Appeal from Dubuque District Court.—HON. FRED O'DONNELL, Judge.

TUESDAY, JANUARY 10, 1905.

ACTION at law to recover damages for personal injuries received by plaintiff resulting from a fall upon one of defendant's streets. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

G. A. Barnes, J. B. Powers, and Longueville & Kintzinger, for appellant.

McCarthy, Kenline & Roedell, for appellee.

DEEMER, J.—While passing over a driveway crossing a footpath or place for a sidewalk in the defendant city plaintiff slipped and fell by reason of the icy condition of the way, and received the injuries of which he complains. The street upon which plaintiff fell runs east and west. It has about a twenty per cent grade. There is a sidewalk on either side thereof, and the one on the north has cleats nailed thereon at intervals of about fourteen inches to keep travelers from slipping. Some years ago a portion of this sidewalk was removed to make room for a driveway into one of the abutting lots. This driveway was covered with rocks and sloped to the southeast. Some time before plaintiff received his fall it became partially covered with ice, which, on account of the presence of stones and débris, became uneven, rough, and slippery. The distance from the top of the walk to the ground which constituted the driveway was something like 16 inches at the westerly side of the drive. The icy condition was due to water running from the driveway out

toward the street, and it had existed for a month or more prior to the time plaintiff fell. At about seven o'clock in the evening of a February day in the year 1902 plaintiff, while on his way to church, approached the driveway on the sidewalk from the west, came to the space left in the sidewalk for this driveway, stepped down from the walk with one foot, and as he bore his weight thereon slipped and fell, striking his head and body against the sidewalk, and received the injuries of which he complains. Plaintiff had not theretofore used the walk oftener than once in two weeks, and testified upon the trial that he did not know of its dangerous condition. Others who traveled over this place went into the street gutter to avoid the danger. Still others avoided the danger by going upon the adjoining lot, while others passed directly over the driveway. Its exact condition was not known to plaintiff, and it was so dark when he approached the driveway on the evening in question that he could not see the defects. Plaintiff had on overshoes, and testified that he was walking slowly, looking at the walk ahead; that it was so dark he could not, on account of the height of the sidewalk above the driveway, see the ice upon which he fell. There is no evidence that plaintiff knew of the dangerous condition of the driveway, although he said that he crossed over it some two weeks before, and saw ice upon it.

It is now well settled in this State that one is not necessarily guilty of contributory negligence in passing over a defective street, unless he knows that it is dangerous, and that it is imprudent for him to try to pass

1. CONTRIBUTORY
NEGLIGENCE.

over it on account of its defective condition. He is not guilty of contributory negligence as a matter of law, nor is he bound to take another way. Generally, it is a question for a jury to decide upon all the facts and circumstances in evidence, and an appellate tribunal will rarely revise its findings. There was enough testimony here of care on plaintiff's part to take the case to a jury. *Sylvester v. Town*, 110 Iowa, 258; *Barnes v. Marcus*, 96 Iowa, 679;

Bailey v. Centerville, 115 Iowa, 274; *Rusch v. Dubuque*, 116 Iowa, 403; *Carter v. Lineville*, 117 Iowa, 532. The cases relied upon by appellant are not in point.

II. Certain photographs of the locus were admitted in evidence. The trial court remarked, when passing upon an objection thereto, that they were not admitted as evidence,

2. EVIDENCE: but simply "for illustration by plaintiff of
photographs. what he claims in argument. I will so instruct

the jury." This promise to further instruct was evidently overlooked, for the matter was not referred to in the formal charge. The evidence shows that the photographs exhibited the exact condition of the sidewalk and the driveway at the time plaintiff received his injuries, save that there was no snow or ice on the ground. We think they were admissible. But as the trial court did not admit them save for the purpose of illustration, there is nothing of which defendant may justly complain. *Barker v. Town of Parry*, 67 Iowa, 147; *Dederichs v. R. R. Co.*, 14 Utah, 137 (46 Pac. Rep. 656, 35 L. R. A. 803).

III. Secondary evidence of the preliminary notice given by plaintiff to the city was received. As this was after

3. SECONDARY proof that the primary was lost or destroyed,
EVIDENCE. there was no error. Defendant did not object thereto because no notice to produce was given.

IV. Certain evidence was stricken out during its introduction, and the court, in its instructions, directed the jury not to consider any evidence stricken out in its presence.

4. EXCLUSION This instruction is complained of because it
OF EVIDENCE. does not sufficiently identify the stricken matter. Without copying from the record, we think there is no merit in the contention. There was no room left for conjecture as to this matter, as the ruling striking the evidence was plain. Moreover, the testimony stricken was not prejudicial in character.

V. Certain of the instructions are complained of. It is said that the court assumed therein that the walk was de-

fective and unsafe, whereas it should have left the matter to the jury. A careful examination of the instructions, which need not be set out *in extenso*, convinces us that the complaint is without merit. The whole matter was submitted to the jury under proper instructions.

VI. Defendant asked a number of instructions, some of which were given and some refused. Of the refusal of the court to give some of those asked complaint is made. Such as announced correct rules of law, were given by the court in its charge. Others, which did not contain correct propositions, were properly refused. The instructions clearly presented the issues, and plainly announced the law applicable to such cases.

There is no prejudicial error in the record, and the judgment is *affirmed*.

STATE OF IOWA V. JOSEPH USHER, Appellant.

Murder: EVIDENCE: CROSS-EXAMINATION. The testimony on cross-
1 examination of a witness for the State which is foreign to his
testimony in chief should be excluded.

Confession: PROOF OF SAME. Oral testimony of a confession is not
2 competent, where the confession was reduced to writing and
signed, but its admission was not reversible error where the writ-
ing afterward admitted, substantiated the oral statements.

Self-defense: INSTRUCTIONS. In a prosecution for murder which is
3 admitted but justified on the ground of self-defense, the defend-
ant is entitled to an instruction that the burden is on the State
to show that the act was not in self-defense, especially where the
tenor of instructions given were calculated to impress the jury
with the idea that it was a defense for the defendant to establish.

Appeal from Linn District Court.—HON. WM. G. THOMP-
SON, Judge.

TUESDAY, JANUARY 10, 1905.

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| 126 | 287 |
| 127 | 528 |
| 126 | 287 |
| 128 | 717 |
| 126 | 287 |
| 136 | 607 |

THE defendant was tried on an indictment charging murder in the first degree, and was found guilty of manslaughter. From a judgment on the verdict, he appeals.—*Reversed.*

Redmond & Stewart, Cooper & Lamb, and Smith & Smith, for appellant.

Chas. W. Mullan, Attorney-General, and Lawrence De Graff, Assistant Attorney-General, for the State.

SHERWIN, C. J.—The defendant shot and killed William Garrity on the 26th day of May, 1903. Garrity had worked for the defendant at different times and for different terms during the four or five years immediately preceding his death, and practically all of the time from the middle of March of that year. There had never been any serious trouble between them, and the evidence shows their feelings towards each other to have been that of friends up to the time of Garrity's death. Garrity went to Cedar Rapids about the 10th of May, where he remained until the day before he was killed, and the evidence tended to show that during his absence he was drinking heavily, and was intoxicated at least a part of the time. He returned to the defendant's home in the country with the defendant in the evening of the 25th of May, and the next day assisted in the work on the place. In the evening of that day he was in the sitting room with the defendant's family until about 9 o'clock, when he went to bed in a room which he occupied alone in the second story of the house. Some time thereafter, and after the defendant had gone to bed, the defendant heard a noise upstairs, and went up there to see what the trouble was. He says that he went in Garrity's room, by the bed where he was sleeping, and towards the window; that after he had passed the bed Garrity sprang therefrom to the floor between the door of the room and himself, said he was going to kill him, and started towards him; that he then picked up a

rifle which was in the room, and fired the shot that killed Garrity. After shooting Garrity, the defendant took the gun to a granary, where he attempted to conceal it. He then awakened the other members of his family, and caused some of his neighbors to come to the house. From all of these he concealed the true facts, and stated to them that he thought Garrity had died a natural death. And such was his first statement to the authorities.

Many errors are noted in the appellant's "brief of points," but we shall notice specifically only such matters as we deem material for the guidance of the court and counsel on a retrial of the case. The appellant

1. EVIDENCE:
cross-examination.

caused the bloody bedding that was in Garrity's room to be burned, and on the trial he showed by the testimony of witnesses, and offered to show by the testimony of others, that Garrity was afflicted with a loathsome private disease at the time of his death. There was no error in excluding the testimony. The answers were sought on the cross-examination of the State's witnesses, and were foreign to the matter testified to in chief. Furthermore, the defendant had never given Garrity's condition as the reason for burning the bedding, but had given another reason therefor. Had he done so, the evidence would have been competent as tending to explain the act, but in the absence of such a claim it was immaterial.

The appellant made contradictory statements after his arrest. The last statement made by him was taken in shorthand, and translated for the State. A witness for the State

2. CONFESSION:
proof of
same.

was asked what the defendant said in the statement which was reduced to writing, and was allowed to answer. In *State v. Busse*, 100 N.

W. Rep. 536, we intimated, but did not definitely decide, that parol testimony of a confession is not competent when the confession has been reduced to writing and has been signed by the defendant, and such we conceive to be the rule. It is not controlling here, however, because the writing was

afterwards put in evidence, and the statement of the witness was fully supported thereby.

The court might well have sent Exhibits H and I to the jury room, but it was a matter within its sound discretion, and we do not think the defendant was prejudiced because of the ruling.

The court fully and carefully instructed as to the different degrees of crime included in the indictment, and did not tell the jury in the eleventh paragraph of its charge that the defendant could be found guilty of murder in the first degree if malice was found, whether there was premeditation and deliberation or not.

The fourteenth paragraph of the charge was devoted to the subject of self-defense, and in a general way it covered the law relative thereto. Its whole tenor, however, was

2. SELF-DE-
FENSE: in-
structions.

calculated to impress on the minds of the jurors the idea that it was a defense to be established by the defendant, and that, if he had failed therein, there should be a conviction. The closing clause of the instruction is as follows: "Hence if you find from the evidence that the defendant, at the time and place in question, was assaulted by the said William Garrity, and that from the nature and character of the assault upon him it reasonably appeared to him, as a reasonably prudent, courageous and cautious man, that he was about to suffer death or great bodily harm to himself by reason of the said assault, and that it further so appeared to him that the use of the gun in question was the only means of saving his life or preventing great bodily harm to himself, then he would be justified in using the gun." No instruction to the effect that the burden was on the State to show that the defendant was not acting in self-defense was given, although one was asked. We are of the opinion that it should have been given. The defendant admitted the killing, and justified it on the ground of self-defense. It was therefore of the greatest importance to him that the jury be told that it

must be satisfied beyond a reasonable doubt that he was not acting in self-defense when he killed Garrity. *State v. Donohoe*, 78 Iowa, 486; *State v. Shea*, 104 Iowa, 724. There was a failure in this respect, and an instruction was given which may easily have been understood as placing the burden on the defendant.

It is earnestly contended that the verdict should not be permitted to stand because of the insufficiency of the evidence. We have given the record the careful consideration necessary to determine this question, and cannot agree with the appellant's contention. We find no prejudicial error other than the one noticed. The judgment is reversed, and the case remanded.—*Reversed.*

STATE OF IOWA V. N. A. CARMEAN, Appellant.

126 291
144 97

Corporations: MISAPPLICATION OF FUNDS: CRIMINAL LIABILITY OF

1 **OFFICER.** An officer of a corporation transacting a lawful business is not guilty of larceny under Code, section 4842, for the act of his subordinates in making a misapplication of funds paid to the corporation by a customer, where the same is not done with his knowledge or under his direction, and from which he receives no personal benefit.

Misappropriation of funds: INDICTMENT. To hold an officer of a
2 corporation liable for the fraudulent misappropriation of funds of a customer, entrusted to the corporation, it must be charged in the indictment and shown that the general business of the corporation was illegal, or that the misappropriation in the particular case was with the knowledge or direction of such officer with criminal intent.

Embezzlement: CRIMINAL INTENT: EVIDENCE. To charge an officer
3 of a corporation with embezzlement of funds by the corporation on the theory that the course of business adopted by such officer inevitably led to that result, the criminal intent of such officer in the management of the corporate business must be shown, and evidence of the method of discounting notes and the use of accommodation paper, transactions in themselves not unlawful, is inadmissible on the question of criminal intent.

Same. On the prosecution of an official for the misappropriation of
4 a particular fund received by the corporation, of which he had no

knowledge, evidence of other like transactions not tending to establish a criminal intent with respect to the specific wrong charged, is inadmissible.

Criminal intent: INSTRUCTION. On a prosecution for embezzlement, 5 it was error to charge that criminal intent may be inferred from the inevitable result of the act done, or from the opportunity to ascertain the wrongful act, and the error was not cured by another instruction that to convict there must be proof of the felonious intent to convert the fund.

Embezzlement: EVIDENCE. Where an officer is charged with embezzlement effected through the corporation's course of business, the 6 book entries of clerks made without defendant's knowledge, are not admissible to show a misappropriation.

Embezzlement: VALUE OF PROPERTY. In a prosecution for embezzlement under Code, section 4842, it is essential to find the value of the 7 property embezzled, the same as in larceny, to determine the punishment.

Appeal from Marshall District Court.—HON. G. W. BURNHAM, Judge.

TUESDAY, JANUARY 10, 1905.

DEFENDANT was convicted of embezzlement, and sentenced to imprisonment in the penitentiary for two years at hard labor. From this judgment he appeals.—*Reversed.*

J. L. Carney, for appellant.

Charles W. Mullan, Attorney-General, and *Lawrence De Graff*, Assistant Attorney-General, for the State.

McCLAIN, J.—Defendant was the president and treasurer of the Rhoades-Carmean Buggy Company, a corporation doing business at Marshalltown, and engaged in the manufacture and sale of carriages and other vehicles. This corporation will be referred to in the opinion as the "company." In November, 1901, the firm of Roemer & Miller, doing business at Hampton, Iowa, entered into a commission contract for the sale of vehicles for the company, and there-

after received consignments for which they executed 'notes, with the arrangement that such notes should be paid as the carriages were sold, the notes to be extended from time to time until sufficient sales were made to satisfy them, and the time within which each consignment should be sold being limited by the contract. In December, 1901, Roemer & Miller executed certain notes, five in number, for a consignment of vehicles, which notes were indorsed by the company and transferred to one Meickley. Subsequently, by remittances, which were to be applied as directed, in part on open account and in part on these notes, two of these notes were taken up, the company giving receipts at the time for the remittances, and subsequently paying off the notes in the hands of Meickley, and returning them to Roemer & Miller. In June, 1902, Roemer & Miller sent to the company a draft for \$925.91, for which they asked credit, on account and notes, for \$974.64, the difference between the amount of the draft and the amount of the credit asked being a discount of \$48.74, to which they were entitled under their contract, and then directed that, out of the amount sent, \$385.50 be applied on the notes given in December, and \$585.15 on open account. This draft came into the hands of the clerks of the company in the transaction of their usual business, and credit was given to Roemer & Miller, as asked, for the amount to be applied on open account; but as the notes were not in the hands of the company, but in the possession of Meickley, they were not immediately taken up, and, in September following, these notes being still unpaid, the company made an assignment, and immediately afterward went into bankruptcy. The notes in the hands of Meickley were enforced, as against Roemer & Miller, and the defendant is charged with the embezzlement of the sum of \$385.50 belonging to Roemer & Miller, which should have been applied to the payment of the notes.

It is not claimed that the money which defendant is charged to have embezzled was intrusted to him personally

by Roemer & Miller, or came into his hands, nor that he had any personal knowledge of its receipt, nor that he made any direction as to its disposition, nor that he derived any personal benefit from its misappropriation. Indeed, it is fully conceded that, except as defendant may be chargeable with the general conduct of the business of the company, he is in no way liable, civilly or criminally, for the failure to apply this sum of \$385.50 to the payment of notes in Meickle's hands. We come, therefore, directly to the question whether defendant can be held criminally accountable for the failure of the clerks and servants of the company to apply this sum of money in the satisfaction of the notes which it was sent to pay.

The crime of embezzlement is essentially a statutory offense. The provisions of the section of the Code defining it are as follows:

Sec. 4842. If any officer, agent, clerk or servant of any corporation or voluntary association, or if any clerk, agent or servant of any private person or co-partnership, except persons under the age of sixteen years, or if any attorney at law, collector or other person who in any manner receives or collects money or other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle or convert to his own use, without the consent of his employer, master or the owner of the money or property collected or received, any money or property of another, or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney at law, collector or other person, which has come to his possession or under his care in any manner whatsoever, he is guilty of larceny. If money or property is so embezzled or converted by a series of acts during the same employment, the total amount of the money and the total value of the property so embezzled or converted shall be considered as embezzled or converted in one act, and he shall be punished accordingly.

Although this section in terms provides that any officer of a corporation receiving or collecting money for the use

of or belonging to another, who embezzles or fraudulently converts it to his own use, is guilty of embezzlement, nevertheless the plain purpose of the statute is to provide, with reference to the officers of corporations, that they shall be criminally liable for the fraudulent conversion of the money or property of the corporation just as agents, clerks, or servants of a private person are liable for a like fraudulent conversion of the money or property of their employers, or as any person who receives money or property for the use of and belonging to another is criminally liable for fraudulent conversion to his own use of money or property thus intrusted to him. The purpose of the statute is to punish those who in a fiduciary relation receive and fraudulently convert money or property intrusted to them, or which comes into their hands by virtue of such relationship. The crime of embezzlement, as generally defined by the statutes, consists essentially of the fraudulent conversion or misappropriation of property received in a fiduciary capacity. *State v. Roubles*, 43 La. Ann. 200 (9 South. 435, 26 Am. St. Rep. 179); *U. S. v. Harper* (C. C.) 33 Fed. 471; *State v. Johnson*, 49 Iowa, 141; *State v. Hengen*, 106 Iowa, 711; *State v. Engle*, 111 Iowa, 246; 2 Bishop, Criminal Law, section 325. To a third person who intrusts his money to a corporation, an officer of the corporation is evidently not liable, civilly or criminally, unless by some act or neglect on his part the money is lost or misappropriated; and in view of the concession that defendant did not, through any personal act of his, misappropriate or cause the misappropriation of the particular sum of money intrusted to the company for the payment of the notes above referred to, we are led to the inquiry, what act or omission of defendant with reference to this money was criminal?

The indictment charges that defendant (not as officer of a corporation, but individually) did unlawfully, etc., steal and take \$385.50 of the property of Roemer & Miller, with intent on his part to deprive them of the same, and convert

the same to his own use and the use of the company, without the knowledge or consent of Roemer & Miller; but in describing the method in which the crime was committed, the indictment further recites that defendant was the president and treasurer of the company, and financially interested therein as stockholder, and had charge of its business, with full knowledge of its affairs and system of business, and details the transactions already referred to between the company and Roemer & Miller, and then alleges that the money received by the company was wrongfully and fraudulently, and with intent to convert the same to the use of the corporation and deprive Roemer & Miller thereof, appropriated by defendant to the uses of the corporation, all with the knowledge, consent, and direction of said defendant, and by means of the system of business by him organized. From the allegations thus briefly epitomized it is evident that the intention was to charge defendant with a crime, either by reason of the general supervision which he, as president and treasurer of the corporation, had the power to exercise, and should have exercised, over the conduct of its business, or by reason of his having planned or had knowledge of the course of business, in consequence of which this money was lost to Roemer & Miller. If the first portion of the indictment directly charges personal misconduct of defendant as an individual with reference to money received by him from Roemer & Miller, its allegations in this respect are wholly unsupported by the evidence, and need not be further considered; and it is only those allegations by which it is sought to charge some liability upon defendant by reason of his being an officer in the company, and having general supervision of its business affairs and those relating to its methods of business, which we have occasion now to consider.

We are not referred to any authority for the proposition that the officer of a corporation, no matter how great his responsibility, is criminally liable for the acts of the corporation, performed through other officers or agents, in misap-

appropriating money. It is no doubt true that the corporation would be liable for such misappropriation by its officers; but there seems to be no reason for holding that one officer is to be held criminally accountable for the acts of another officer, nor for the acts of subordinates, unless such acts are by his direct authority and in the execution of a criminal purpose on his part. The officer cannot be criminally liable for the acts of his subordinates in a greater measure than a principal is criminally liable for the acts of his agents or servants, and it is well settled that a principal is not thus liable for the acts of his agent or servant, even though done in the general course of the employment, unless they are directly authorized or consented to by him; for the authority to do a criminal act will not be presumed. *State v. Robinson*, 55 Minn. 169 (56 N. W. Rep. 594); *State v. James*, 63 Mo. 570; *Hipp v. State*, 5 Blackf. 149 (33 Am. Dec. 463); *State v. Smith*, 10 R. I. 258; *State v. Hayes*, 67 Iowa, 27; *State v. Eifert*, 102 Iowa, 188.

There is authority for the proposition that where it is made criminal to conduct a business in a particular manner, or where the result of the general method of conducting a business is to create a nuisance, or in similar cases, the principal may be chargeable with the general method of conducting his business, though it is carried on by his agents or servants without his immediate knowledge; but cases of this kind are clearly distinguishable from those in which the offense is in its nature personal, as in the case of larceny, embezzlement, and other crimes involving direct injury to an individual, and in such cases criminal purpose must be alleged.

In order that defendant shall be held liable for so planning and conducting the business of the company as to result in fraudulent misappropriation or conversion of the money of Roemer & Miller intrusted to the corporation, it must, we think, be charged and shown that such course of

business was either in its essential characteristics illegal, and devised and carried on for the purpose of effecting a criminal result; or that, with the knowledge and under the direction of defendant, it was so carried on in a particular case as to effect such result. It seems to us that the indictment does not in any of these respects allege the facts necessary to fix criminal liability upon the defendant. And the proof is no stronger than the indictment. There is in this record no evidence of any intention on the part of defendant that this money should be misappropriated.

In this connection we may refer to some rulings in the introduction of evidence of which defendant complains. For the purpose of showing a course of business carried on under the general direction of defendant by which such loss as was occasioned by Roemer & Miller might naturally result, the prosecution was allowed to introduce much evidence with relation to the method of discounting notes and the use of accommodation paper. It seems to us this evidence was inadmissible, for there is no claim that the transactions themselves thus testified to were unlawful, nor is there anything in the evidence to show that the purpose of carrying on the business in this way was to misappropriate money. The view entertained by the trial court seems to have been that, if this course of business was likely to result in some case in the misappropriation of money, and did result in this case in such misappropriation, then the defendant must be presumed to have intended such result; and the jury were instructed, on this theory, that "the fraudulent conversion of property or money of another is the voluntary commission of such an act, the inevitable effect of which is to deprive the true owner of his property or money, * * * and a criminal intent may be inferred from the commission of such an act"; and, further, that, if defendant had knowledge of the fact, or had the means of knowing, from the manner in which the business

2. MISAPPROPRIATION OF FUNDS: indictment.

3. EMBEZZLEMENT: criminal intent; evidence.

was done and the books kept by the company, that the system of business of the company, inaugurated by defendant and pursued under his direction, would result in the money of Roemer & Miller not being applied on the notes for the payment of which it was sent, but in its being turned into the cash account of the company, and thereby lost to said Roemer & Miller, defendant would be guilty of the crime charged. Now, we think that, in the admission of this evidence and in these instructions, the court committed error. It cannot be true that the voluntary doing of an act, the unexpected consequence of which, even though inevitable, is to deprive the owner of his property, there being no intention that the act shall have such result, can constitute the crime of embezzlement; nor that the mere means of knowledge on the part of the officer of the corporation that its method of doing business, sanctioned by him, will in a particular case result in the failure to apply money received to the proper purpose, in the absence of any intention on his part that such result shall follow in such case, will constitute such crime. The difficulty with the whole theory on which the case was tried is that it sanctions a conviction for a crime without any evidence either of any criminal act or any criminal intent on the part of defendant.

As to the evidence received with reference to other transactions, it is pertinent also to suggest that, even though they were criminal, they could not be shown in this prosecution, unless they tended to establish a criminal

4. SAME.

intent with reference to the misappropriation of the money of Roemer & Miller. *State v. Lewis*, 19 Or. 478 (24 Pac. Rep. 914); *Commonwealth v. Shepard*, 1 Allen, 575; *Stanley v. State*, 88 Ala. 154 (7 South. Rep. 273); *Lang v. State*, 97 Ala. 41 (12 South. Rep. 183); *People v. Cobler*, 108 Cal. 538 (41 Pac. Rep. 401). As it is conceded that defendant had no knowledge whatever with reference to the misappropriation of any money of Roemer & Miller, proof of other transactions of a similar character

could not have had any bearing on the intent of defendant with reference to this particular transaction. The court explained to the jury that the evidence of other transactions and the method of doing business did not alone show any violation of law, and told them that the crime charged must be found, if at all, in the receiving of money by the company, with specific directions to apply upon notes given by patrons of the company, and mingling of such money with the funds of said company; but in this instruction we think the court failed to add to the evidence of a course of business which is conceded to have been legitimate any fact which the jury could find from the evidence tended to show any crime on the part of defendant. The defendant did not receive the money, nor intentionally fail to apply it upon the notes, for he had no knowledge of its receipt.

Perhaps the fundamental difficulty with the theory of the trial court was that he did not consistently bear in mind the general rule that in criminal cases proof of some fact

or facts tending to show criminal intent is essential. There is a class of crimes, consisting in the violation of police regulations, in which

5. CRIMINAL
INTENT:
instructions.

a criminal intent is said not to be material; but larceny, embezzlement, and other crimes involving willful and fraudulent purpose to injure another are not within this class. *Kletzing v. Armstrong*, 119 Iowa, 505; *State v. Ames*, 119 Iowa, 680; *State v. Culver* (Neb.), 97 N. W. Rep. 1015; *Hamilton v. State*, 46 Neb. 284 (64 N. W. Rep. 965). The cases relied upon by counsel for the State as to this proposition are not in point. They relate to such crimes as the receipt of deposits by a bank officer with the knowledge that the bank is insolvent, and belong to the class of cases as to method of transacting business. The defendant was not charged with any crime of transacting business in an improper manner, but specifically with embezzling the money of Roemer & Miller. The court in one instruction told the jury that felonious intention to convert the money was es-

sential to constitute the crime; but in other instructions they were told that the criminal intent might be inferred from the inevitable effect of the act done, or from opportunity of knowledge as to the conduct of the business; and these facts were not, in our judgment, even if shown, sufficient of themselves to impute criminal intent to the defendant.

One other matter relating to the introduction of evidence should be noticed. The State was allowed, over defendant's objection, to introduce in evidence entries on the books of the company, made by clerks in the course of their employment, without the direction, and even without the knowledge, of the defendant.

6. EMBEZZLEMENT: evidence.

So far as these entries were relied upon as showing the misappropriation of the money with which defendant was charged, they were not admissible. *State v. Ames*, 119 Iowa, 680.

The court did not require the jury to find the amount or value of the money or property embezzled by the defendant, but, on a general verdict of guilty, imposed a sentence which would be justified only if the money or property embezzled exceeded \$20 in value.

7. EMBEZZLEMENT: value of property.

The section of the statute already quoted provides that one who embezzles money or property of another, etc., "is guilty of larceny." It is essential, therefore, as in larceny, that the jury find the value of the property stolen; for, without such finding, the court is not possessed of information essential for determining the measure of punishment. *State v. Smith*, 48 Iowa, 595; *State v. Wood*, 46 Iowa, 116; *State v. McCarty*, 73 Iowa, 51. Perhaps the want of a special finding as to the amount of money appropriated would not in this case require a reversal, as there is no conflict in the evidence on the subject; and no doubt the court was justified in assuming that, if there was any embezzlement, it was of the amount of more than \$20; but in view of the argument for the State, that no distinction as to degrees or measure of punishment is made in

the provision relating to embezzlement, and that therefore the amount in value of the property embezzled is not to be taken into account in determining the punishment for that crime, we have thought it proper to say that the value of the property embezzled is of the same significance in determining the punishment as the value of the property stolen where the prosecution is for larceny.

For the errors pointed out, the judgment of the trial court is reversed, and the case is remanded for a new trial.
— *Reversed.*

JOHN A. REED, Appellant, v. F. M. CUNNINGHAM and ELLIS
E. SLUSS.

Recovery of public funds: SUIT BY CITIZEN: DEMAND THAT OFFICIAL SUE. A citizen and taxpayer cannot maintain a suit to recover funds of a city alleged to have been misappropriated, without first demanding of the proper officers that suit be brought, or a showing that such demand would have been unavailing.

Appeal from Linn District Court.—HON. WM. G. THOMPSON, Judge.

TUESDAY, JANUARY 10, 1905.

ACTION by plaintiff, as a citizen and taxpayer of Cedar Rapids, to recover moneys alleged to have been illegally paid to the defendants by the county treasurer of Linn county for services in discovering property omitted from the assessment rolls. The petition was dismissed, and plaintiff appeals.— *Affirmed.*

E. C. Barber, for appellant.

F. L. Anderson, for appellees.

LADD, J.—The gravamen of the charge is that the county treasurer, in virtue of a resolution by the city council of Cedar Rapids, approving a previous arrangement of certain members of its finance committee, paid to defendants thirty per cent. of the taxes collected on property found by them to have been omitted from the tax lists for services as rendered. That a citizen and taxpayer of a municipality has such an interest in its funds that he may maintain an action in a proper case is not questioned. See *Heath v. Albrook*, 123 Iowa, 559. Before this may be done, however, the appropriate officers of the municipality must be requested to act. This is the rule with respect to suits by a stockholder in behalf of a private corporation (*Dillon v. Lee*, 110 Iowa, 156), unless the circumstances are such as to indicate affirmatively that a demand would have been unavailing (*Schoening v. Schwenk*, 112 Iowa, 733). And there is even stronger ground for exacting a similar request of the governing body of a public corporation and a showing of neglect or refusal as a condition precedent to the institution of suit by a taxpayer for the recovery of money illegally diverted from its treasury. Public officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty; and until it is made to appear that they have refused to do so, or have neglected to act under circumstances rendering this equivalent to a refusal, there is no occasion for the intervention of the citizen for the protection of himself and others similarly situated. Indeed, such refusal or neglect is the very basis on which equity will take jurisdiction; for otherwise the taxpayer whose interest is indirect would be utterly without remedy. But for the right to invoke the aid of a court of equity officers might plunder the public treasury with entire immunity so long as they, or others for them, continue in control of the governing body. See *People v. Ingersoll*, 58 N. Y. 1 (17 Am. Rep. 178). The cause of action belongs to the corporation, but is enforceable, rather than that justice shall utterly

fail, by the remedy in equity at the suit of its members. Those primarily charged with the enforcement of corporate rights, however, are not to be interfered with, save in cases where, because of unjustifiable neglect or failure to act, such a course appears necessary for the protection of the rights of the taxpayer. *Land, Log & Lumber Co. v. McIntyre*, 100 Wis., 245 (75 N. W. Rep. 964; 69 Am. St. Rep. 915); *Zuelly v. Casper*, 160 Ind. 455 (67 N. E. Rep. 103; 63 L. R. A. 133). The petition contains no averment, nor the record of any evidence of demand that action be prosecuted by the city, or circumstances obviating the necessity thereof, and for this reason relief was rightly denied.— *Affirmed*.

MARGARET PRICE, ET AL., Appellants, v. A. E. BLACK, ET AL., Appellees.

Mines and mining: COAL LEASE: DUTY OF LESSEE. Where a lessee
1 contracts to operate a coal mine in a workman-like manner and to pay the lessor a royalty on the coal mined, there is an implied covenant to work the mine with reasonable diligence. •

Forfeiture: ABANDONMENT: EVIDENCE. In an action to declare a
2 forfeiture of a coal mining lease on the ground of abandonment, the evidence is reviewed and held to sustain the finding of the trial court that the failure to continuously operate the mine, under the circumstances shown, was insufficient to authorize a forfeiture.

Appeal from Mahaska District Court.— HON. A. R. DEWEY, Judge.

WEDNESDAY, JANUARY 11, 1905.

SUIT in equity to enjoin defendants from trespassing upon plaintiff's real estate. Defendants claimed a right to go upon the land in virtue of a mining lease. To this plaintiffs responded by pleading an abandonment of the tenancy. On these issues the case was tried to the court, resulting in a decree dismissing plaintiffs' petition. Plaintiffs appeal.— *Affirmed*.

J. C. Williams, for appellants.

John O. Malcolm and *C. C. Orvis*, for appellees.

DEEMER, J.—In February of the year 1893, plaintiff and her husband, the then owner of certain lands in Mahaska county, leased the same to the Garfield Coal Company; and in May of the year 1902 the coal company sublet the property to one Gibbons, and he, in turn, on September 16, 1902, sublet the same to the defendants, Black & Cook. The lease was of the coal underlying the land, and was to continue until February 18, 1908, unless the coal was sooner mined out. The lessee agreed to operate the mine in a good and workmanlike manner, and to pay as royalty 8 cents per ton on all lump coal. It was also provided that the lessor should have two tons of nut coal per month, for which no charges were to be made. Plaintiffs are the heirs at law of Joshua Price, deceased, and as such, claim that the lease was forfeited and abandoned by the defendants and their sub-lessees, and that they are entitled to the possession of the property. Defendants deny the alleged forfeiture and abandonment, and rely upon the lease as the basis of their right to the possession of the property.

The original lessee, the coal company, worked the mine to a limited extent during the years 1895 to 1900, both inclusive, but did no more work before subletting the property. Shortly before this action was commenced, which was in October of the year 1902, the defendants, who are sub-lessees, resumed the operation of the mine, and each and all of the defendants claim and testify that there was no intention to abandon the mine; that, whatever the delay, it was caused by difficulties in getting at the coal; and that plaintiff has at all times down to the commencement of this suit recognized the continued existence of the lease. Failure to operate the mine for nearly two years is regarded by plaintiffs as a

1. MINES AND
MINING: coal
lease; duty
of lessee.

forfeiture and abandonment of the lease. The rule that forfeitures are not favored is so well understood that we need not take space for the citation of authorities. And generally speaking, abandonment of a lease is a question of intent, to be arrived at from all the testimony in the case. Of course, this may be inferred from the acts of the parties. The stipulation in the lease to operate the mine in a good and workmanlike manner, as well as the obligation implied by law, because of the royalties to be paid, imposed upon the lessee the duty of reasonable effort and diligence in the operation of the mine; and, according to some of the authorities, failure to perform this covenant operates as a forfeiture of the lease. *Maxwell v. Todd*, 112 N. C. 677 (16 S. E. Rep. 926); *Cowan v. Radford Co.*, 83 Va. 547 (3 S. E. Rep. 120); *Huggins v. Daley*, 99 Fed. 606 (40 C. C. A. 12; 48 L. R. A. 320). This rule is not universal, however. In some jurisdictions the only remedy in the absence of abandonment is an action for damages for breach of covenant. *Harris v. Ohio Coal Co.*, 57 Ohio St. 118 (48 N. E. Rep. 502); *Koch's Appeal*, 93 Pa. 434. But that there is an implied covenant to work a mine with reasonable diligence under such a state of facts as is here disclosed is the holding of all the authorities. *Huggins v. Daley*, *supra*; *Higgins v. Cal. Co.*, 109 Cal. 304 (41 Pac. Rep. 1087); *Chamberlain v. Parker*, 45 N. Y. 569; *Kunkle v. People's Co.*, 165 Pa. 133 (30 Atl. Rep. 719; 33 L. R. A. 847); *Petroleum Co. v. Coal Co.*, 89 Tenn. 381 (18 S. W. Rep. 65); *Cowan v. Radford*, 83 Va. 547 (3 S. E. Rep. 120); *Guffy v. Hukill*, 34 W. Va. 49 (11 S. E. Rep. 754; 8 L. R. A. 759; 26 Am. St. Rep. 901). Whether or not forfeiture results from failure to observe this covenant, we shall not now decide, for appellants' counsel does not rely upon a forfeiture for breach of covenant, but upon an abandonment of the lease. So that the issue is a narrow one — simply and solely a claimed abandonment. That there may be such conduct as amounts to an abandonment, and thereby a forfeiture, is well settled. *Worrall v.*

Wilson, 101 Iowa, 475; *Robinson v. Boys*, 61 N. J. Law, 179 (38 Atl. Rep. 813); *Plummer v. Hillside Coal Co.*, 160 Pa. 483 (28 S. E. Rep. 853); *Snodgrass v. South Co.*, 47 W. Va. 509 (35 S. E. Rep. 820).

Going now to that question, which is one of mixed law and fact, we find that while the original lessee, the coal company, worked the mine in but a desultory way for something like six years, plaintiffs' ancestor made

2. FORFEITURE:
abandonment;
evidence.

and seemed content. For something like two years the mine was not worked. This delay was due largely to difficulties in operating the mine. There were three methods of removing coal from this field — one by means of mules, another by what is known as the "tail-rope system," and still another by sinking a shaft and hoisting the coal to the surface. The first two were tried without bringing satisfactory results, and, just before this suit was commenced, defendants had, at considerable expense, sunk a shaft near the plaintiff's land, had set their engine, and had been to other large expense in getting ready to mine the coal, all with the knowledge and consent of the plaintiffs herein. Moreover, Margaret Price, one of the lessors, was receiving coal during practically all the time, as provided for in the lease. It was discovered after due trial that the only successful method for removing the coal from plaintiffs' land was by the shaft system; and the defendants had, with the knowledge of the plaintiffs, been to a large expense in sinking the same, and providing the necessary machinery, when this action was brought. Failure to operate the mine is sufficiently accounted for, and no abandonment should, under the circumstances, be inferred therefrom. Of course, lapse of time is evidence of abandonment, but it is not conclusive. Act and intent must concur, before a court is justified in finding a forfeiture through abandonment. With the conclusion of the trial court that there was no abandonment we are in full accord.

Whether or not plaintiffs are entitled to recover damages for breach of the implied covenant of which we have spoken is not for us to decide at this time. We mention it now for the purpose of indicating that this action should not be treated as a bar to such a proceeding.

Sustaining our conclusions on the entire case are the following: *Hosford v. Metcalf*, 113 Iowa, 240; *Oreamuno v. Uncle Sam Co.*, 1 Nev. 215.

The decree is right, and it is *affirmed*.

J. W. BUSSELL, Appellee, v. THE CITY OF FORT DODGE,
ET AL., Appellants.

Defective streets: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE. In

1 an action against a city for injuries to a pedestrian caused by an excavation in the street, the evidence as to plaintiff's contributory negligence is reviewed and held to present a question of fact for the jury, whose finding will not be disturbed.

Same. Where the uncontradicted testimony of a pedestrian was that

2 he did not know of an excavation in the street until he fell into it, he was not guilty of contributory negligence in imprudently attempting to pass over it, although there was another safe and convenient way.

Instructions: ERRONEOUS USE OF WORDS. Where the court properly

3 charged that the negligence complained of was failure to provide adequate protection against a street excavation and that if the city failed in this respect a finding of negligence was warranted, the further instruction that if plaintiff had failed to show that the excavation, was "properly" protected he could not recover, was not misleading, as from the whole charge it was apparent the word "improperly" was intended.

Appeal by cross defendant. An order for continuance against a de-

4 fendant to a cross petition is not appealable.

Same. An appeal does not lie from an order refusing to direct a verdict

5 in favor of a cross defendant, as to whom there had been no trial.

Appeal from Webster District Court.—HON. G. W. DYER,
Judge.

WEDNESDAY, JANUARY 11, 1905.

ACTION at law to recover damages for a personal injury. The action as commenced by plaintiff was against the defendant city alone, and in the petition it was charged that the accident through which plaintiff received the injuries of which he complained, was occasioned by his falling in the nighttime into an excavation or pitfall dug and negligently allowed to remain unprotected in a public street of said city. The city answered by a general denial. With its answer it filed in the case a notice to Frank Corey, which it had theretofore served upon him, and which in terms gave notice of the pendency of plaintiff's action, and that as the owner of the abutting lot and having made the excavation in question for his own purposes, the city would look to him to pay any judgment that might be obtained against it. Thereafter the city procured from the court permission to make said Frank Corey a party defendant, and filed as against him a cross-petition, which will be noticed in the opinion as far as necessary. Said Corey, on being brought in, filed various motions and a demurrer addressed to the cross-petition, all of which being in turn overruled he filed an answer. Thereafter trial was had to a jury. Corey, although represented by counsel, was not permitted by the court, acting on its own motion, to have any part in the trial. At the close of the evidence he (Corey) moved for a verdict in his favor, which was overruled. Thereupon, and on its own motion, the court continued the case as to him, and to this both plaintiff and the defendant city objected and took exception. The case was then submitted to the jury as against the defendant city, and there was a verdict and judgment in favor of plaintiff. The defendant city appeals from the judgment, and also from the order continuing the case as against the defendant Corey. The defendant Corey appeals from the ruling of the court refusing to instruct a

verdict, and also from the order for continuance.— *Affirmed.*

M. J. Mitchell, for appellant city of Ft. Dodge.

Kenyon & O'Connor, for appellant Corey.

C. W. Hackler and Healy Bros. & Kelleher, for appellee.

BISHOP, J.— First as to the questions involved in the appeal by the defendant city:

I. Counsel for appellant do not deny in argument but that a case of actionable negligence on the part of the city was fully made out. The contention is that the record fails

1. DEFECTIVE STREETS: personal injury; contributory negligence. to show that, at the time of his accident, plaintiff was in the exercise of 'ordinary care, and was therefore free from contributory negligence.

The excavation into which plaintiff fell was in the line of the sidewalk, and had been made by defendant Corey in connection with the erection of a building by him as the owner of the abutting lot. Plaintiff testified that he did not know of the existence of such excavation. He further testified that the night was dark, and that as he passed along the walk the first intimation he had of the presence of the danger was when he fell into the excavation. The evidence as to a barricade about the excavation, and as to the sufficiency thereof, and with reference to the display of signal lights, was in conflict. On the whole, we have no doubt but that the question of care on the part of the plaintiff was one for the jury. Its finding was warranted, and we cannot disturb it.

II. The defendant requested an instruction to the effect that if plaintiff knew of the excavation, or by the exercise of ordinary care should have known thereof, and

2. SAME. that it was imprudent to attempt to pass over the same, and if there was another and safe way which he could have taken, then he was guilty of contributory negligence and could not recover. The request

was refused, and properly so. The reason therefor becomes apparent when it is remembered that plaintiff testified that he did not know of the excavation until he fell into it, and in this he was not contradicted. Knowledge of the danger is essential to the rule as announced by the cases which counsel cite and rely upon. In this case the contributory negligence of plaintiff, if such there was, consisted in his going into the excavation, when, had he been exercising due care, he would have discovered such excavation in time to have avoided it. This was the view taken by the trial court, and we think the jury was properly instructed with reference thereto.

III. Complaint was made of the ninth instruction given, for that the same was misleading and did not contain a correct statement of the law. The particular criticism is

that in such instruction the word "properly"
3. INSTRUCTIONS:
erroneous use
of words. was used instead of the word "improperly,"

the latter manifestly being the appropriate word. We may concede that in the use of the word mentioned, and as hereinafter more particularly referred to, the instruction was, in the abstract, open to the criticism made. But we cannot believe that any misunderstanding resulted. At the outset the jury was told that the negligence charged against the city was in failing to provide proper protection against the excavation, and that thought is carried through the instructions as a whole. In the eighth instruction the jury was told specifically that if the city had failed in its duty in the respect indicated, a finding of negligence would be warranted. Now, in the ninth instruction the jury was told that "if plaintiff has failed to establish either that he was in the exercise of reasonable care, or that the excavation was *properly* protected, or that sufficient light was placed to apprise a person of the existence of the excavation, etc., your verdict will be for the defendant." It was incumbent upon plaintiff, of course, to prove that the excavation was *improperly* guarded. If it could

be said that the attention of the jurors was attracted to the word used, still it must be said that the real meaning of the court stands out so plain upon the pages of the charge that there was no room left for misapprehension. Moreover, it does not appear that the attention of the trial court was specifically called to the error in the use of words by the motion for new trial.

IV. Other alleged errors, having relation to the admission of evidence, to requests for instructions, and to instructions given are either without merit, or are disposed of by what has already been said. The contention for

4. APPEAL.

error based upon the ruling of the court ordering a continuance of the case as sought to be made against defendant Corey under the cross-petition cannot be considered, as such was not an order from which an appeal could be taken. *Jaffray v. Thompson*, 65 Iowa, 323.

Coming now to the appeal by the defendant Corey, it is apparent that the theory of the cross-petition is that, as between the city and Corey, the liability to plaintiff in this case, if any such there be, must be held

5. SAME.

to rest solely upon the latter. This thought is predicated upon the allegation that the excavation in the street was made by Corey, and for his own uses and purposes, and, further, that to leave the same without the erection of proper barriers and the display of proper signal lights was an offense under the ordinances of the city. The prayer is that if the matters charged in the petition shall be found to be true, and plaintiff have judgment in any amount against the city, the city have judgment for a like amount against Corey. Now, whatever may be said respecting the attitude of the court in refusing to allow Corey to have any part in the trial, and should we concede that under any circumstances an appeal could be prosecuted from a ruling upon a motion to direct a verdict, it seems clear that this appellant has no standing in this court. There had been no attempt at a trial of the case as against him, and it was not proposed to ask the

jury to consider him or his rights or interests in making up a verdict. A motion to direct a verdict simply challenges the sufficiency of the record to make out a case as against a defendant who has been compelled to submit to a trial. In effect, it amounts to no more than a request that the court find the facts instead of ordering a verdict. If the motion include an attack upon the sufficiency of the pleadings, as in this case, it may be regarded as akin in character to a motion in arrest of judgment as well as a demurrer to the evidence. As a general rule — and we need not stop to make inquiry as to what circumstances, if any, could be relied upon to justify an exception — an appeal does not lie directly from the ruling denying a motion for verdict, or from the verdict itself, or from a ruling denying a motion in arrest. Code, section 4101; *Andrews v. Concannon*, 76 Iowa, 251; *Walker v. Pumphrey*, 82 Iowa, 487; *Miller v. Sharpe*, 54 Cal. 590; *Ryan v. Kranz*, 25 Minn. 362; *McLeod v. Bertschy*, 30 Wis., 324; 2 Enc. of Pl. & Pr. 82, 107.

We have already seen that an order directing the continuance of a cause for trial is not the subject of a direct appeal.

From what has been said, it follows that the appeal by the defendant Corey, must be, and is, dismissed. On the appeal by the defendant city of Ft. Dodge, the judgment must be, and it is, *affirmed*.

LOUISA E. BORGHART V. CITY OF CEDAR RAPIDS, Appellant.

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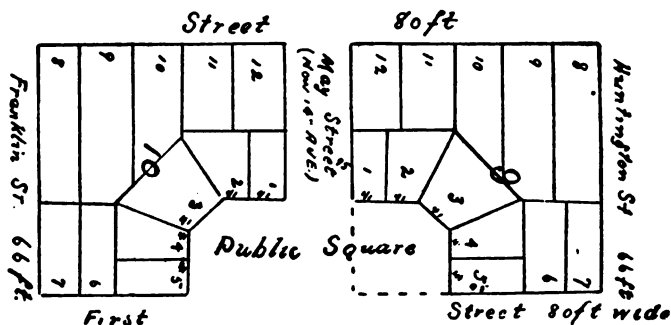
Vacation of public ground: DAMAGE TO ABUTTING OWNER. A city has
 1 power to vacate public grounds, and where all property owners are affected alike by its exercise, though in different degrees, there is no remedy; but where an abutting owner sustains an injury peculiar to his property by the vacation of public ground used as an ingress and egress thereto he is entitled to damages.

Limitation of actions: PLEADING. Limitation is an affirmative defense and must be pleaded by allegation of facts constituting the same, otherwise it is waived.

Appeal from Linn District Court.—HON. WM. G. THOMPSON, Judge.

WEDNESDAY, JANUARY 11, 1905.

MAY, FERO & GAINOR's Addition to Cedar Rapids was platted in 1856. The plaintiff became owner of lot 3 in block 9 in 1896. As appears from the annexed plat, this lot, with others, abutted on ground designated "Public Square" which furnished the only access to it. In 1902 the defendant city conveyed to that part of the square bounded by block 9 and First street and Fourteenth avenue to the John Huss Methodist Episcopal Chapel, and the latter erected a parsonage thereon, so as to completely obstruct all access by way of the square to said lot. It was stipulated that the depreciation in the value of the lot resulting therefrom was \$125, but contended on the part of the defendant that the law does not authorize recovery for any injury occasioned by the vacation of a street or public ground. The court directed a verdict for plaintiff, and from judgment thereon the defendant appeals.—*Affirmed.*



John N. Hughes, for appellant.

Powell, Harmon & Powell, for appellee.

LADD, J.—The validity of the proceedings which resulted in the vacation of that portion of the public square affording access to the plaintiff's lot and its conveyance by the city to the John Huss Methodist Episcopal Chapel is not questioned by either party. That this square was intended to be used in part, at least, as a street approach is manifest from the fact that some of the lots were platted facing it, and with no other means of access. This is conceded, impliedly, at least, by appellant, for the cause is submitted on the theory that damages for the vacation of a street or public ground used as such may not be recovered from the city. The power to vacate is expressly conferred by statute, and, when all property owners are affected alike, though in different degrees, by its exercise, there is no ground upon which to base a remedy. But here the injury complained of is peculiar to plaintiff's property, and not such as is shared by the public generally. In so far as the street or public ground was necessary to the free and convenient way for travel to and from the lot, her right to its use for that purpose was appurtenant to her premises, and essential to their enjoyment. The abutter has a right, in common with the community, to use the street from end to end for the purpose of passage; but, in addition to this common right, he has an individual property right, appendant to his premises in that part of the street which is necessary to free and convenient egress and ingress to his property. That this latter right is private and personal and unshared by the community, and cannot be taken away without answering in damages, is held by substantially all the authorities. *O'Brien v. Central I. & S. Co.*, 158 Ind. 218 (63 N. E. Rep. 302; 57 L. R. A. 508; 92 Am. St. Rep. 305); *Anderson v. Turbeville*, 6 Cold. 150; *Selden v. City of Jacksonville*, 28 Fla. 558 (10 South. Rep. 457; 14 L. R. A. 370; 29 Am. St. Rep. 278);

1. VACATION OF
PUBLIC
GROUNDS:
damage to
abutting
owner.

Moose v. Carson, 104 N. C. 431 (10 S. E. Rep. 689; 7 L. R. A. 548; 17 Am. St. Rep. 681); *Town of Rensselaer v. Leopold*, 106 Ind. 29 (5 N. E. Rep. 761); *Bradbury v. Walton*, 94 Ky. 167 (21 S. W. Rep. 869); *Heinrich v. City of St. Louis*, 125 Mo. 424 (28 S. W. Rep. 626; 46 Am. St. Rep. 490); Elliott on Roads & Streets, section 877.

The question considered in *Long v. Wilson*, 119 Iowa, 267, was whether an adjudication against a municipality that certain ground was not a part of the street was *res judicata* as to a landowner ingress and egress to whose property would be cut off, and it was declared that he had a right to and interest in the street distinct and different from that of the general public. In the course of the opinion the court said:

It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business, and that the public shall have the means of getting there for social and business purposes. In such a case access to thoroughfares connecting his property with other parts of the town or city has a value peculiar to him apart from that shared in by citizens generally, and his right to the street as a means of enjoying the free and convenient use of his property has a value quite as certainly as the property itself. If this special right is value — and it is of value if it increases the worth of his abutting premises — then it is property, regardless of the extent of such value. Surely, no argument is required to demonstrate that the deprivation of the use of property is to that extent the destruction of its value.

As such destruction is presumed to have been for the public good, the public must make just compensation for the property to the extent taken. As the authority of the city to vacate is conceded, it is manifest that the remedy by *certiorari* was not available to plaintiff, and that her only recourse was an action for damages. The decisions upon which appellant relies were reviewed in the last-cited case, and shown not to be inconsistent with the conclusion announced.

II. Appellant insists that inasmuch as the claim is for unliquidated damages, and was not filed with the clerk of defendant city within 30 days after the conveyance of the square, the cause of action is barred by the statute of limitations. See *Kenyon v. City of Cedar Rapids*, 124 Iowa, 195. This defense is an affirmative one, and, to be available, the facts constituting it must be pleaded. *Harlin v. Stevenson*, 30 Iowa, 371; *Tredway v. McDonald*, 51 Iowa, 663. By omitting to do so, the defense is deemed to have been waived. *Robinson v. Allen*, 37 Iowa, 27; *Brush v. Peterson*, 54 Iowa, 243; *Welch v. McGrath*, 59 Iowa, 519. See *Reed v. City of Muscatine*, 104 Iowa, 183. One of the grounds of the motion to direct verdict was the bar of the statute, and appellant argues that, as a motion is enumerated as a pleading in section 3557 of the Code, the bar of the statute of limitations was raised by the pleadings. That section has reference to written motions filed in making up the issues in the case. The bar of the statute must be made an issue, and it seems hardly necessary to say that a motion to direct a verdict is necessarily based on the issues as previously joined and the evidence adduced bearing thereon. By failing to make the statute of limitations an issue in the case, that defense was waived.—*Affirmed.*

I. S. McCONKIE, F. D. McCONKIE, and JOHN LOWER, v. ISAAC LANDT, Appellant.

Intoxicating liquors: FINES: ATTORNEY FEES. Where a fine has been imposed for the sale of liquor in violation of an injunction, the ten per cent. of the fine allowed by Code, section 2429, in addition to the reasonable fee provided for the attorney prosecuting the cause, cannot be recovered either as costs or otherwise until the fine has been collected.

Fines: COLLECTION OF ATTORNEY FEES: INJUNCTION. An *ex parte* order in vacation for the issuance of an execution to collect, as

attorney fees, ten per cent. of an uncollected fine imposed for the sale of liquor in violation of an injunction, is void for want of notice, and a suit to restrain its enforcement will lie.

Appeal from Cedar District Court.—HON. J. H. PRESTON,
Judge.

WEDNESDAY, JANUARY 11, 1905.

ACTION to enjoin proceedings under an execution. Decree for plaintiffs. Defendant appeals.—*Affirmed.*

Charles W. Kepler, for appellant.

Jamison & Smyth, for appellees.

MCCLAIN, J.—A judgment in behalf of the State for \$600 fine and costs was obtained in a suit instituted by defendant against the plaintiffs in this action for the illegal selling of intoxicating liquors in violation of an injunction. Thereafter the Governor remitted the fine on condition that the costs be paid. The costs were paid, including the attorney's fee provided for in such cases, which was taxed as part of the costs, under a provision found in section 2406 of the Code. Subsequently, without any notice to these plaintiffs, the judge of the court in which the judgment for the fine had been entered made an order in vacation directing the clerk to issue execution against the plaintiffs for the collection of ten per cent. of the fine which had been remitted, as additional attorney's fees taxable as costs in the case under provisions of the Code. The present action is brought to enjoin the enforcement of such execution. The provision of the Code relied upon is as follows:

Section 2429. In all actions in equity against persons charged with keeping a nuisance, and to abate the same, and all proceedings for a contempt for violating any injunction, temporary or permanent, issued or decreed therein, the court or judge before whom the same shall be heard and deter-

mined shall allow the attorney prosecuting such cause a reasonable sum for his services, and in case a fine shall be assessed, he shall be allowed ten per cent. of the fine collected.

The contention for appellant is that the ten per cent. provided for constitutes an additional attorney's fee, taxable as costs in favor of the attorney of the plaintiff in the contempt proceeding, and that the Governor

1. FINES: attorney's fees.

could not and did not attempt to relieve the defendants in that proceeding from the payment of this ten per cent. But it is to be noticed that it is "ten per cent. of the fine collected" which is to be assessed as part of the costs, and that this ten per cent. is not in addition to the fine, but is a part of it; that is, when the fine is collected, ten per cent. thereof is to be paid to the attorney of the plaintiff in the proceeding. If \$600 fine had been collected, ten per cent. of the amount which would otherwise have gone to the county would have been payable to plaintiff's attorney. It seems clear, therefore, that when the fine was remitted, so that it was not and could not be collected, there was no fund from which any amount could be taken for the benefit of the attorney. It matters not whether the ten per cent. is to be treated as a part of the costs, for even if to be so treated, there never has been any fine collected, a per cent. of which could be taxed up as costs. The ten per cent. is allowed for the collection of the penalty imposed. *Brennan v. Roberts*, 125 Iowa, 615; *Sims v. Pottawattamie County*, 91 Iowa, 442.

It is also contended that the remedy of plaintiffs was by appeal from the order entered by the judge in vacation, directing the clerk to issue execution, and that this suit to

restrain the enforcement of the execution cannot be maintained. But if in entering such order the judge acted without jurisdiction then

2. FINES: collection of attorney fees; injunction.

the plaintiffs were not bound to take any notice of the order, and, when threatened with the enforcement of the execution against their property, may ask relief by way of injunction.

Leonard v. Capital Ins. Co., 101 Iowa, 482; *Iowa Union Tel. Co. v. Boylan*, 86 Iowa, 90; *Connell v. Stelson*, 33 Iowa, 147; *Hawkeye Ins. Co. v. Huston*, 115 Iowa, 621. After the expiration of the term at which judgment was rendered against them, plaintiffs were not required to take notice of further proceedings in the case. *Perry v. Kaspar*, 113 Iowa, 268; *Schiele v. Thede*, 126 Iowa, 398.

The judge is authorized, on application made to him, to enter an order in vacation directing the clerk or sheriff as to the issuance or enforcement of an execution. Code, section 3843. But such an order can be made only after notice to the opposite party. Code, sections 3834-3841. While the notice required on an application to the judge in vacation for relief incident to the case, of which the court has acquired jurisdiction, is not necessarily the same kind of notice as that required of the institution of an action, it is nevertheless essential, in order that the judge have authority to act, and we think that it is jurisdictional. The action of the judge in the present case, on which the execution now sought to be enjoined was based, was purely *ex parte*, and without notice of any kind to the adverse party. The judge's order was therefore void.

The judgment of the trial court enjoining the enforcement of the execution is *affirmed*.

STATE OF IOWA v. C. G. WASSON, Appellant.

Robbery: INDICTMENT: OWNERSHIP OF PROPERTY. An indictment
1 for robbery which does not allege the ownership of the property,
is insufficient.

Indictment: SUFFICIENCY. While in general it is sufficient to charge
2 an offense in the language of the statute, this rule does not obtain
where the statute does not necessarily charge the offense named.

Cross-examination of defendant. The State may cross-examine a
3 defendant as to his residence or occupation, although it may tend
to discredit him.

Evidence: IMPEACHMENT. It is error to permit the State to impeach a defendant on immaterial matters developed on his cross-examination.

Appeal from Linn District Court.—HON. W. N. TREICHLER, Judge.

WEDNESDAY, JANUARY 11, 1905.

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129 142

THE defendant was convicted of the crime of robbery, and appeals.—*Reversed.*

James H. Trewin and Edmund Nichols, for appellant.

Charles W. Mullan, Attorney-General, and *Lawrence De Graff*, Assistant Attorney-General, for the State.

SHERWIN, C. J.—The indictment charges that the defendant assaulted Thomas Malone, “and, with force and violence, willfully and feloniously did steal, take, and carry away from the person” of said Malone the sum of \$75. The indictment does not otherwise allege the ownership of the property, and its sufficiency is assailed because thereof. Section 4753 of the Code provides: “If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery.” The offense thus created by the statute embraces all of the elements essential to the crime under the common law. 2 Cooley’s Blackstone (4th Ed.), section 242. Under the statute, as well as by the common law, robbery is larceny committed by violence from the person of one put in fear. Lord Hale defined it as “the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling.” 1 Hale, Pleas of the Crown 532. In 2 Bishop’s Criminal Law, section 1158, it is said that rob-

1. ROBBERY: indictment; ownership of property.

bery is a mere compound larceny. It is larceny aggravated by the matter which by the common law or by the statute makes it robbery. The crime, as defined by the statute, includes larceny from the person, and one who is indicted for the former may be convicted of the latter offense. *State v. Reasby*, 100 Iowa, 231; *State v. Mikesell*, 70 Iowa, 178; *State v. Graff*, 66 Iowa, 482. In proceeding under the common law, it is necessary to allege and prove ownership, precisely as in larceny, and such has been held to be the rule where it is a statutory crime. 2 Bishop's Criminal Procedure, 1006; McClain's Crim. Law, section 481; 18 P. & P. 1223; *People v. Ammerman*, 118 Cal. 23 (50 Pac. Rep. 15); *Brooks v. People*, 49 N. Y. 436 (10 Am. Rep. 398); *Com. v. Clifford*, 8 Cush. 215; *State v. Morgan*, 31 Wash. 226 (71 Pac. Rep. 723); *State v. Dengel*, 24 Wash. 49 (63 Pac. Rep. 1104); *Boles v. State*, 58 Ark. 35 (22 S. W. Rep. 887).

To constitute the crime of robbery, there must be larceny from the person, within the meaning of the law. There can be no larceny or robbery where a person takes his own property, or where he takes the property under a bona fide belief that it is his own. In other words, it is essential that the taking be *animo furandi*. *State v. Hollyway*, 41 Iowa, 200. It is the general rule, and the rule in this State, that an indictment charging larceny, simple or compound, must allege the ownership of the property. *State v. Cosgrove*, 109 Iowa, 68; *State v. Mullen*, 30 Iowa, 203; *State v. Morrissey*, 22 Iowa, 158. In *State v. Cunningham*, 21 Iowa, 433, the indictment charged larceny from the person, and alleged the ownership of the property to be in the person from whom it was taken, while the proof showed that it belonged to him and his partner. This was held sufficient, but we there recognized the necessity of the allegation of ownership. The presumption of guilt arising from the recent possession of stolen property applies in robbery as well as in larceny. *State v. Harris*, 97 Iowa, 407. Section 5289 of the Code

requires that, when material, the name of the person injured or attempted to be injured be set forth, when known to the grand jury, or if not known, that it be so stated in the indictment. In *State v. McConkey*, 20 Iowa, 574, this requirement of the law was applied to an indictment for trespass, and the indictment held bad because the ownership of the land on which the trespass was committed was not alleged.

While it is generally sufficient to charge an offense in the language of the statute, such is not the rule when the statute does not necessarily charge the offense named. *State v. Curran*, 51 Iowa, 112; *State v. Butcher*, 79

2. INDICTMENT:
sufficiency.

Iowa, 110; *Quinn v. C., B. & Q. Ry. Co.*, 63

Iowa, 510. As we have shown, robbery is but

larceny in an aggravated form, both by common law and under the statute; and, as larceny is defined to be the felonious taking of the property of another, we are of the opinion that an allegation of ownership is necessary in an indictment for robbery. It is said, however, that, if this be conceded, the indictment must be held good, because it charges that the defendant did "steal from the person of Malone." It is true that we have held that the word "steal," used in an indictment, means a felonious taking. *State v. Griffin*, 79 Iowa, 568. But we have never gone beyond this, and cannot, because of the requirement of the statute already referred to.

The defendant was a witness in his own behalf, and on cross-examination he was asked questions as to his former residence and occupation, which elicited information from which it might be inferred that he had been an inmate of the reform school at Eldora. There was no error in this. While it was not competent

3. CROSS-EXAMINATION OF
DEFENDANT.

to show that fact by direct testimony, the State had the right to cross-examine the witness on both subjects, although it might tend to disgrace and discredit him. *State v. Pugsley*, 75 Iowa, 742.

Many immaterial questions were asked the defendant

on cross-examination, and his answers thereto were contradicted by the State on rebuttal. In this there was prejudicial error. It is a familiar rule that a witness may
4. EVIDENCE: not be impeached on immaterial matters. *State*
impeachment. *v. Falconer*, 70 Iowa, 416. That such an attempt was prejudicial is apparent, and would alone require a reversal of the case.

The other errors complained of are not likely to arise if there shall be a retrial of the case, and we need not discuss them.

For the errors pointed out, the judgment is reversed and the case remanded.— *Reversed*.

TELIE EAKINS, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.

Railroads: NEGLIGENCE: PLEADINGS. In an action for negligence
1 against a railway company, an allegation of the petition that the town had, by ordinance, prohibited the obstruction of the street by cars, should be stricken, where it was not also alleged that the street extended over the right-of-way.

Negligence: EVIDENCE. The liability of a railway company for a
2 personal injury is dependent upon a violation of some duty which it owes the plaintiff. The evidence is reviewed and held insufficient to establish negligence, and to support a directed verdict for defendant.

Appeal from Cass District Court.—HON. W. R. GREEN,
Judge.

THURSDAY, JANUARY 12, 1905.

ACTION for damages. Verdict was directed for the defendant, and from judgment thereon the plaintiff appeals.—
Affirmed.

W. E. Haynes and H. M. Boorman, for appellant.

Carroll Wright, John I. Dille, and J. B. Rockafellow,
for appellee.

LADD, J.— The defendant's depot in Anita is at the foot of Walnut street, which extends north from and at right angles with the railroad. There is a sidewalk on the east side of this street, which extends over the defendant's right of way to the northeast corner of the depot platform. This is the customary approach to the depot, and the walk over the right of way is maintained by the company. There are three tracks north of the depot, but the main track is immediately south of it. The plaintiff was about to depart for Colorado, and through another had arranged with defendant's station agent to signal its fast train known as the "Flyer," which was not scheduled to stop at Anita, to stop, and take her aboard. Accompanied with Belle Irving, she walked down Walnut street to the first track north of the depot, and found it occupied by a long train of freight cars. The conductor was standing on the walk, and, being informed that the plaintiff desired to take the "Flyer," advised that the train could not be separated, as the engine was not attached; that they would not have time to go around, and that they would either have to crawl under or go over the coupling in order to reach the train. The conductor then put her "grip" across, and upon her statement that she was afraid to go under, showed her where to step in the stirrup under the car and on the "bumpers," and then took her by the arm, and helped her upon the latter. She straightened up with both feet on the bumpers and one hand holding her dress, and he let go. In getting down, in some way her skirts caught on the couplings, and she fell, striking on her head and becoming unconscious. She pursued her journey the following day, but the evidence tended to show that she has never fully recovered from the injury received.

I. The court, on motion of the defendant, struck from the petition an allegation that the incorporated town of Anita

had, by ordinance, prohibited the obstruction of the streets by leaving cars therein. The ruling was correct. There is no allegation that Walnut street extended over defendant's right of way, and, unless it did, defendant was not guilty of obstructing the street.

II. Unless defendant violated some duty due to plaintiff, she cannot recover. She was not a passenger, though intending to become such. In the regular course of defendant's business the fast train due at 11 o'clock

1. **NEGLIGENCE:**
pleadings. a. m. did not stop at Anita, and its employes ordinarily had no occasion to keep the approaches to the depot open for the coming or going of passengers at that time. The house tracks north of the depot were placed there for use in switching, and, as Walnut street did not extend over the right of way, the defendant was guilty of no wrong in leaving the train of freight cars on the north track, unless it owed the plaintiff the duty to have the way to the depot open. But there is no showing of the time when Irving requested that the train be stopped for her. For all that appears, this may have been after the freight cars had been set on the house track. Certainly the conductor had no knowledge of her wish until she reached the track, and requested that the train be separated so that she might pass through. It was then too late, for the engine was on the elevator track, and must have been run out on the main track before it could be backed down the house track to the cars. There was not sufficient time for this before the arrival of the "Flyer," and by the rules of the company the latter had the right to the track. The conductor then was not negligent in obstructing the way. Nor is the station agent shown to have been in the wrong. He was not shown to have been requested to signal the train to stop long enough before her arrival at the track to enable him to advise the conductor of her coming. It is not claimed in argument that the conductor was careless in assisting plaintiff over the coup-

lings. In the absence of any affirmative showing of negligence on the part of defendant, it is unnecessary to consider other matters discussed. The court rightly directed a verdict for defendant.— *Affirmed.*

EMMA DAMMAN V. GEORGE VOLLENWEIDER, ET UX., Appel-
lants.

Execution of instruments: BURDEN OF PROOF: EVIDENCE. Where the execution of a note and mortgage is denied under oath, the burden is on a plaintiff seeking judgment and foreclosure, to prove the execution. Evidence is held insufficient to show that defendants signed the instruments in suit.

Appeal from Dubuque District Court.—HON. FRED O'DON-
NELL, Judge.

THURSDAY, JANUARY 12, 1905.

ACTION in equity to recover judgment on a note and for foreclosure of a mortgage. Defendants, who are husband and wife, denied under oath the execution of the note and mortgage, and asked by way of affirmative relief that the mortgage be canceled and satisfied of record, in order that the cloud thereby created on defendants' title to the premises be removed. Decree for plaintiff. Defendants appeal.—*Reversed.*

Longueville & Kintzinger, for appellants.

W. A. Leathers, for appellee.

MCCLAIN, J.—The only question in this case is one of fact, viz., did defendants sign the note and mortgage sued

on? Under the issues the plaintiff has the burden of proof as to her cause of action. The claim is that she furnished \$400 to her mother, Mrs. Young, residing in Dubuque, to be loaned for plaintiff's benefit, and that the loan was made to defendants by one A. W. Hosford, who took the note and mortgage in question, payable to plaintiff. Neither plaintiff nor Mrs. Young were present at the time of the transaction, and the instruments purporting to bear defendants' signatures, the mortgage acknowledged before Hosford, as notary, were delivered by him to Mrs. Young. In a deposition taken outside of the State Hosford testifies that at the time of the transaction he was doing business in Dubuque as a real estate and loan agent; that he first procured a loan for defendants for \$200 from a bank on their note, secured by mortgage on their homestead; that subsequently he procured another loan of \$300 for them from a Mrs. Sohn, evidenced by their note, secured by mortgage on the same property, from the proceeds of which loan the first note and mortgage were satisfied; that at a later date, desiring to borrow another \$100, they applied to him for a further loan of that amount, and at his suggestion they executed their note and mortgage on the same property to plaintiff, with the understanding that the note and mortgage to Mrs. Sohn would be paid off by him out of the proceeds. Hosford admits that he did not satisfy the Sohn note and mortgage, but wrongfully retained the money, which should have been applied by him to that purpose. The testimony of defendants substantially agrees with that of Hosford as to the prior transaction; but with reference to the last they say that they executed no note or mortgage to plaintiff, but gave a note for \$100, unsecured, to Hosford for money furnished by him, and had no knowledge of plaintiff or Mrs. Young until afterward. Hosford's testimony as to the execution of the note and mortgage to plaintiff is very much weakened, as we think, not only by the fact that, according to his account of the transaction, he fraudulently appropriated \$300 of defendants' money, but

by these further facts: That, as shown by his receipts, and as admitted by him, he continued to receive from defendants interest payments on Mrs. Sohn's note for \$300 and a supposed note to himself for \$100, the interest payments on these two amounts being made separately, and at different times, without anything being said to defendants as to any interest to be paid on any \$400 note to plaintiff, and himself paid the interest to plaintiff on her note; that he denied to defendants subsequently the existence of any note to plaintiff; and that, as shown by the testimony of four witnesses, uncontradicted, his reputation for truth and veracity is bad. Plaintiff relies on admissions said to have been made to her and to Mrs. Young separately by defendant Vollenweider that the note to plaintiff was paid, but, in view of the circumstances under which these admissions are claimed to have been made, we are not inclined to attach much weight to the uncorroborated testimony of plaintiff and Mrs. Young with reference thereto. The so-called admissions may well have been inadvertently made, if, as he testifies, he had no knowledge of the existence of any note to plaintiff, and supposed he was talking to Mrs. Sohn, or some one representing her. Plaintiff further relies on testimony of experts, based on examination of the note and mortgage in question and genuine signatures of defendants, that the signatures to the note and mortgage were genuine. But such testimony in its very nature is entitled to but little weight, and the judgment of the witness was shown to be of small value by tests applied to them on cross-examination as to their ability to distinguish between genuine and fictitious signatures of defendants submitted to them for comparison with the signatures admitted to be genuine. Two witnesses for defendants, one testifying as an expert, the other as a person familiar with defendants' handwriting, testified that the signatures in question were not the genuine signatures of the defendants. There is nothing of controlling weight, therefore, in favor of plaintiff as to the genuineness of the signa-

tures. The trial court had before it for the purpose of comparison the signatures in question and the signatures admitted to be genuine, and these signatures are now before us for the same purpose. The result of the comparison is not favorable to plaintiff's claim. We reach the conclusion that plaintiff has not established her claim by a preponderance of the evidence, and that defendants have by a preponderance of evidence shown themselves entitled to have the cloud of the alleged mortgage removed from their title. Relief should have been refused to plaintiff, and a decree entered for defendants as prayed.—*Reversed.*

T. F. GREENLEE, Appellee, v. JULIA E. MOSNAT, Executrix of the Will of J. J. MOSNAT, Deceased, Appellant.

Special interrogatories. Special interrogatories in the nature of a
1 cross-examination of the jury should be refused.

Compromise and settlement: EXCLUSION OF EVIDENCE. In an action
2 to recover of an attorney money collected for a client, after deducting a stated collection fee, where defendant admitted the service but denied that the collection fee as alleged was agreed upon and pleaded other and prior services performed and full settlement of the entire controversy, it was error to exclude evidence of such other service, which was not cured by the indirect appearance in the record of a portion of the excluded testimony.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

THURSDAY, JANUARY 12, 1905.

THE opinion states the case.—*Reversed.*

C. Nichols and Tom H. Milner, for appellant.

C. W. E. Snyder, S. B. Montgomery, and Gilchrist, Whipple & Brown, for appellee.

WEAVER, J.—The plaintiff brings this action at law, alleging that he employed J. J. Mosnat, an attorney at law, to collect certain claims held by him against certain insurance companies, under an agreement that said Mosnat should have and receive in full compensation for his services ten per cent. of the amount so collected. He further alleges that Mosnat did collect said claims, but has failed to pay over the full amount due the plaintiff, after deducting the agreed commission of ten per cent., and he asks a verdict for the remainder. Mosnat appeared and answered, admitting that he performed services for plaintiff in the collection of said claims, but denied that he agreed to accept ten per cent. of such collections in full payment. He further answers, alleging that after performing the service he had an accounting and settlement with plaintiff, and paid him the full balance found due. He further alleges that prior to the time of his employment to collect these claims he had performed other services for the plaintiff in and about certain other claims against another insurance company, and in preparing proof of loss thereon, and that, after making the collections above referred to, a controversy arose in good faith between plaintiff and the defendant as to the amount of the defendant's compensation, and as to the sum plaintiff was entitled to demand and receive, and that, for the purpose of putting an end to said controversy, the defendant offered and tendered to the plaintiff the sum of \$4,004.75 in full payment and satisfaction of his claim for moneys in defendant's hands, and that plaintiff, with full knowledge of the offer, accepted and received the money, and has ever since retained it. There was a trial to a jury, and verdict for the plaintiff. The judgment entered upon this verdict was reversed by this court on defendant's appeal. *Greenlee v. Mosnat*, 116 Iowa, 535. A retrial having resulted in another verdict and judgment for plaintiff, the defendant again appeals. Since the first trial, J. J. Mosnat has died, and the executrix of his will has been substituted as the party defendant.

I. The appellant assigns error upon the ruling of the trial court in refusing to submit certain special findings. Without attempting to set out the proposed interrogatories — eleven in number — we may say that, in our

1. SPECIAL IN-
TERROGATORIES. judgment, they do not call for ultimate facts, but are rather in the nature of a cross-examination of the jurors concerning the method of their deliberations, and there was no error in refusing to submit them.

II. The next objection is of a more serious nature. It has been noted in the statement of the issues that defendant pleads that, prior to his appointment by the plaintiff to

2. COMPROMISE
AND SETTLE-
MENT: exclu-
sion of evi-
dence. bring suit upon the insurance policies mentioned in the petition, he performed other services for the plaintiff, and that, after the collections had been made, a controversy in good faith having arisen as to his compensation, he tendered a certain sum, to be received in full satisfaction of plaintiff's claim, and that plaintiff accepted and received it. For some reason not entirely clear from this record, the trial court ruled out all evidence offered by defendant in support of the allegation concerning services alleged to have been rendered by plaintiff for defendant prior to the date of the alleged contract for a ten per cent. commission. For example, the defendant, as a witness in his own behalf, was asked whether he performed services for the plaintiff prior to the date of the alleged contract for a ten per cent. commission, what such services consisted of, and whether any agreement was had with plaintiff concerning the amount of compensation to be paid therefor. Answers to all these questions were excluded on the ground of immateriality. Error is predicated upon these rulings, and we are constrained to hold the exception well taken. In the first place, the matters inquired about were directly pleaded and relied upon in the answer, and, at least as a general rule, a defendant may offer evidence to establish the truth of any fact pleaded by him and not admitted. In the second place, it was vital to this branch of the defense to

prove that the alleged controversy over the amount of the defendant's compensation was in good faith. If the jury found that there was an agreement for a ten per cent. commission for collecting the policies mentioned in the petition, and there was no showing of any other service rendered, they might believe that the claim made by defendant for more than such commission was not asserted in good faith, while, if it were proven that defendant had in fact performed other and additional services for plaintiff, for which no compensation had ever been made, such fact might very properly lead the jury to the opposite conclusion. It follows as a necessary consequence that the exclusion of the defendant's evidence in support of this claim was prejudicial error.

Counsel for appellee seek to avoid this result by suggesting that, notwithstanding the rulings complained of, the defendant did in fact state what he claimed to be the fact in respect to this service. But this is hardly correct. - It is true that defendant did speak of certain service performed by him in relation to a claim against another insurance company, but the matter came into the record in an indirect manner, and did not serve to neutralize the effect of the rulings complained of. The exclusion of the testimony was so often and so emphatically repeated that the jury must have been thoroughly impressed with the thought that the testimony was immaterial, and not entitled to any weight in the defendant's favor. The ruling sustaining the plaintiff's objection was never withdrawn or modified, and we cannot assume that the error was cured because a part of the excluded testimony indirectly found its way into the record.

As there have been two verdicts in the case, we regret the necessity of remanding it for another trial, but the error referred to seems to be manifest, and its prejudicial character cannot be doubted.

For the reasons stated, the judgment of the district court is *reversed*.

ANTON H. SCHOFIELD, Appellee, v. CLYDE COOPER and
MARIE COOPER, Administrators of Estate of WALTER
COOPER, Deceased, and J. ORENSEN and CALHOUN
COUNTY, Appellants.

Surface water: DIVERSION. A county in the improvement of high-
1 ways has no right to collect surface water either from the high-
way or from adjoining lands and turn it onto the land of another
where it had not naturally flown.

Drainage: ESTOPPEL. No matter what the evidence may show in
2 support of an estoppel, if not pleaded it is unavailing. In the in-
stant case the evidence fails to show that one landowner was
estopped as against another from filling a drainage ditch.

Drainage: NUISANCE: ABATEMENT. Where the county constructed
3 a highway ditch in such manner that the surface water from the
land of one landowner was made to flow unnaturally over the
land of another, the latter had the right to abate the nuisance so
created by going upon the highway and filling the ditch.

Easement: ADVERSE USER. The act of one landowner in filling a
4 highway ditch carrying water from the land of an adjacent owner
onto his own, when done within the period of limitation, will
defeat the claim of easement growing out of adverse user.

Appeal from Calhoun District Court.—HON. Z. A. CHURCH,
Judge.

THURSDAY, JANUARY 12, 1905.

SUIT in equity to compel defendants to remove obstruc-
tions placed by them in a ditch running along the side of a
highway between Webster and Calhoun counties. The trial
court granted the relief prayed, and defendants appeal.—
Reversed.

Wright & Nugent and M. E. Hutchinson, for appellants.

Kenyon & O'Connor, for appellee.

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DEEMER, J.— Plaintiff is the owner of the S. E. one-fourth of the S. W. one-fourth of section 31, in Webster county, Iowa, and defendants Cooper of the N. W. one-fourth of the N. W. one-fourth of section 2, in Calhoun county. These lands are separated by a highway which runs east and west between the two counties. As this highway is a correction line, the north and south lines of the two tracts do not exactly correspond. Plaintiff's west line is some distance west of defendants' west line, and the east lines of the two tracts show the same divergence. However, for all practical purposes we may treat the lines as continuous. To the west of both properties, running north and south, is a natural stream, known as "Cedar Creek," over which, in the line of the highway, is a 25-foot bridge. East of that the land is almost level, the natural drainage being towards the south. Some distance east of the creek bridge and south of the west fourth of plaintiff's land there is a culvert, which we shall call "culvert No. 1," across the highway, which is about one and a half feet higher than the banks of the creek. East of the culvert the land is somewhat lower, and still east of that a trifle higher, than at the culvert. East of this point the land again descends slightly toward the east until it reaches another culvert between plaintiff's and defendant Coopers' lands. This we shall call "culvert No. 2." East of this culvert the land again rises slowly and gradually. At culvert No. 2, which drains a large part of plaintiff's land and all the land immediately east thereof, a ditch was constructed by defendant Coopers' father southwesterly through his land until it reaches Cedar creek to the west. On the southwest corner of plaintiff's land are two ponds, one of which extends into the highway, culvert No. 1 being at the west side thereof. There are also at least two ponds on the southeast corner of plaintiff's land, the overflow from which drains through culvert No. 2. Culvert No. 2 was constructed more than twenty years ago, and it carried the surface water from nearly all of the plaintiff's land down upon and through

the land owned by Cooper, which was the natural course of the water. At the extreme southwest corner of plaintiff's land, where the ponds are of which we have spoken, there is a small tract which naturally drained toward the southwest and over land belonging to one Hinch; this land being immediately west of that owned by Cooper. Just the number of acres which were so drained we have no means for ascertaining, save that it appears from the maps to be small, and nearly covered by ponds.

Commencing with culvert No. 1, the elevations in the highway going eastward are as follows: At the culvert, 100; just east of the pond in the highway, 99.95; at the north side of highway, where the fill of which complaint is made was put in, 100.32; and on the south side of the highway, at same place, 99.96; a few rods east of this fill, 99. These are all the data we have, save that the elevations show a natural drainage from the pond in the highway southwesterly over the land owned by Hinch, with a divide between the Hinch and the Cooper land, the elevation of which varied from 101.20 at the north end thereof to 100 at the south. As near as we can gather from the evidence, culvert No. 2 was built about the year 1875, and ditches made in the north side of the highway to convey the water thereto. Culvert No. 1 was built by order of the board of supervisors in the year 1899. At the same time a road was thrown up through and across the pond, and a ditch dug on the north side of the highway, commencing at or near the pond, and running east along the highway through the slight divide of which we have spoken, until it connected with the ditches theretofore constructed to carry the water to culvert No. 2. At the highest point in the highway between culverts 1 and 2 this ditch was two and a half or three feet deep. It was originally dug by a contractor under the county, and down until about the year 1897 carried the water from the southwest part of plaintiff's lands and the overflow from the ponds which did not pass through culvert No. 1 along the highway

eastward to culvert No. 2. No complaint was made of this by the Coopers until the wet years came, and then, as we understand from the evidence, they, in the year 1897, went upon the highway without permission from any one, and filled up the ditch on the north side of the highway at its deepest place. This obstruction was removed by plaintiff, and, after some further attempts to close the ditch, the Coopers went before the board of supervisors of Calhoun county, and secured an order for the closing of the ditch. Defendant Orenson is the road district supervisor, and he, with the Coopers, pursuant to the orders of the board, in November of the year 1899 filled in the ditch at its deepest point. Plaintiff thereupon brought this action to compel the removal of the obstruction.

The law of the case is well settled, and not difficult of application. The county had no right to collect surface water, either on the public highway or from the lands of another, and discharge it upon the lands of one

1. SURFACE WATER: diversion. where it was not wont to go. That it did collect such from a small fraction of the southwesterly part of plaintiff's land and the overflow from the ponds there situate, and carry it through the ditch along the north side of the land down to culvert No. 2, is so well established as to be beyond the pale of reasonable dispute. This it had no right to do. *Holmes v. Calhoun County*, 97 Iowa, 360; *Willitts v. C. B. & K. C. R. R.*, 88 Iowa, 285; *Coltins v. Keokuk*, 91 Iowa, 293; *Drake v. C. R. I. & P. R. R.*, 70 Iowa, 59; *Vannest v. Fleming*, 79 Iowa, 638; *Friday v. Henah*, 113 Iowa, 425; *Agne v. Slitsinger*, 96 Iowa, 181. This being true, defendants Cooper had the right to abate the nuisance by filling up the ditch; and the county had authority to give them the permission to do so, unless it be for some matters to which we shall presently refer. The county should have so improved the road as that the surface water would follow its natural course. This it could have done, so far as it was possible to take care of the water in the

ponds on the southwesterly part of plaintiff's land, by placing culvert No. 1 where it crossed the road at the lowest elevation instead of at a point higher than the course of the natural drainage. Having the right to abate the nuisance growing out of the acts of the county in improving the highway, there was no wrong on the part of the Coopers, unless it be that they are estopped by conduct from now closing the ditch.

While adverse user for more than ten years is pleaded, the evidence does not sustain this plea. Defendants objected to this user and first filled the ditch in the year 1897, which was less than ten years after it was established.

2. DRAINAGE: ^{es-}
toppel.

No easement was therefore acquired. But plaintiff contends in argument that the ditch was constructed with the aid and assistance of the Coopers; that that part of it west of the obstruction was done under a contract made by the county with one Kent, and that defendants Cooper knew of and acquiesced in the expenditure of money made by the county for that purpose, and that at various times defendants Cooper assisted in cleaning out the ditch that the water might pass through the same; that they enlarged the ditch on their own farm so as to accommodate the accelerated flow of water, and never made any complaint thereof until nearly ten years after the work was done, when, with wet seasons coming on again, they undertook to stop the flow of water through this ditch. Suffice it to say with reference to these matters that they are available to the plaintiff, if at all, as tending to create an estoppel on the part of the defendants. No estoppel is pleaded by him, and under well-known rules he cannot have the advantage thereof, no matter how strong his proofs may be.

However there is no evidence that the defendants Cooper had anything to do with that part of the ditch which they obstructed. When the improvements were made at culvert No. 2, the defendants Cooper did assist in making ditches to take care of the surface water coming from the southeast part of the plaintiff's land and the land lying east of plain-

tiff's tract; but there was no attempt to cut through the divide, and no ditch was made at the point where it was afterwards obstructed by the defendants. That ditch was not made until Kent graded up the road under his contract with the county, and he (Kent), pursuant to his contract, cut the ditch in question so as to make some of the water from the southwest corner of plaintiff's land flow through the same eastward to culvert No. 2. Theretofore the water had passed to the southwest, over Hinch's land. Defendants had no part in the construction of this ditch. The evidence fails to show that the Coopers cleaned out the ditch westward of the place where the obstruction was placed, or at any other place, save to the extent necessary to take care of the surface water from the southeast part of plaintiff's land. It is true that the county spent some money in grading up the road, building culverts, etc., which we must presume was with the Coopers' knowledge; and, if this were properly pleaded as an estoppel, we should be inclined to hold it sufficient for that purpose. But there is no pleading tendering that issue which we can find in the case. The same may be said as to the cleaning out of the ditch. There is no evidence that the Coopers enlarged the ditch through their own land to take care of the water coming from the southwest part of the plaintiff's property. But, if there had been, as plaintiff did nothing on the strength thereof which he would not otherwise have done, and as the ditch so enlarged was not used for the time necessary to create an easement, there is no estoppel here. As to this we may also say that no estoppel on account thereof is pleaded.

Plaintiff seems to be relying on adverse possession, or the establishment of an easement by prescription. He has not shown such uninterrupted user as to establish such right, and therefore must fail. But he claims that he has established such user against the county, and that defendants can have no other or greater rights than the county. This argument is specious, rather

3. DRAINAGE:
nuisance;
abatement.

than sound. In the end the water goes down over defendant Coopers' land. This water did not naturally flow there. If its discharge upon them was a nuisance, no matter who was responsible therefor, they had the right to abate that nuisance by going upon the property of the county. In so doing they were performing an act which the county should have done, and in a sense were acting for the county.

But whether this last proposition be true or not, defendants' act so interfered with the user of the ditch by the plaintiff and the county as to defeat the claim of easement growing out of adverse user. The mere fact

4. EASEMENT:
adverse user. that the county was in the wrong would not give the plaintiff a right to flood land. The county makes no claim of a right to flood defendants' land; neither does it claim that the ditch should be maintained for the protection of its highway, or that it is necessary to maintain the same in order that it may improve the highway. It expressly ratified and confirmed the Coopers' act in filling in the ditch. So that the only controversy here is really between the plaintiff and the Coopers. Plaintiff has failed to establish the allegations of his petition, and must therefore be dismissed.

The decree in so far as it is based upon an estoppel is wrong, in that no estoppel is pleaded. On the issues as presented to us the plaintiff is not entitled to a decree, and the judgment must therefore be *reversed*.

JESSE O. WELLS, Plaintiff, v. THE DISTRICT COURT OF POLK COUNTY, and JOSIAH GIVEN, Judge thereof, Defendants.

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Contempt: REVIEW ON CERTIORARI. The statutes relating to procedure in contempt cases authorize the appellate court on *certiorari* to review the evidence and determine whether it is sufficient to make out a case of contempt.

Contempt: EVIDENCE. Contempt proceedings are criminal in nature, and to authorize a conviction the proof of guilt should be clear and satisfactory. The evidence is reviewed and held insufficient to make out a case.

THURSDAY, JANUARY 12, 1905.

CERTIORARI proceedings originally brought in this court to review the action of the district court of Polk county, Hon. Josiah Given, Judge, in respect of certain contempt proceedings had in that court, and wherein this plaintiff was adjudged to be guilty of a contempt of court, and by the judgment ordered to pay a fine and costs. The opinion states the case.—*Annulled.*

Connor & Weaver and Bremner & Shular, for plaintiff.

W. H. Baily and others, for defendants.

BISHOP, J.—The return to the writ issued out of this court makes it appear that in October, 1903, an information was filed in the district court of Polk county charging this plaintiff with a contempt of court, for that, being a party defendant in a certain cause pending in said court he had knowingly attempted to improperly influence the conduct of one John Fletcher, a juror in regular attendance upon said court, and afterwards drawn and sworn as one of the jury for the trial of such cause, by causing and procuring one F. A. Marvin to converse with said juror about such cause, the merits thereof, and the verdict to be rendered therein, and to solicit said juror to favor the defendant therein in respect of the verdict to be rendered. Upon the filing of such information a rule issued, and in response thereto this plaintiff appeared, and made answer in writing, and under oath, in which he denied all and singular the allegations in the information contained. A motion for discharge, based upon the denials contained in the answer, having been overruled, a trial was had on oral testimony produced in open court,

resulting in a finding of guilty and the entry of judgment for a fine and costs.

Various questions of law are raised by the petition, and are discussed in argument by the respective counsel. In the view we take of the case, but one of such questions is material to be noticed, and this we shall do presently.

L. CONTEMPT:
review on
certiorari.

One of the allegations of the petition for the writ is "that the said court and judge erred in the trial of the said proceedings in finding this plaintiff guilty, for the reason that there was no evidence whatever that this plaintiff ever authorized or had any knowledge of what was claimed to have been done by the said Marvin in attempting to improperly influence said juror Fletcher." Counsel for defendants insist that the intrinsic correctness of a contempt judgment, as that the same had no warrant in the evidence, cannot be reviewed by proceedings of certiorari, it appearing that the trial court had jurisdiction, and that its proceedings were conducted in due form. We may concede that such is the rule where the subject is not governed by provisions of statute. Under our statute, however, the writ of certiorari may issue, not only for the correction of errors committed as in excess of jurisdiction, or to set aside the illegal acts of an inferior tribunal, but in all cases when authorized by law. Code, section 4154. And by Code, section 4468, it is provided that "no appeal lies from an order to punish for contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari." That by revision it was intended that the court sitting in review should pass upon the fact question involved, so far at least as to determine whether the act shown to have been committed was or was not sufficient in law to constitute a contempt, is made clear, as we think, by the reading of Code, section 4466. There it is provided that all the evidence upon which the action of the court is founded must be in writing, and made a part of the record. Such would be an idle proceeding if the judgment of the court as to the legal effect

or sufficiency of the evidence to make out a case of contempt could in no instance become the subject of review. Without further discussion, it will be sufficient to say that our reports present a number of cases where the right to review the facts in contempt cases has been assumed by this court, and we are agreed that in view of the statute such right is not open to question. Among other cases that might be cited, see the following: *Bartel v. Hobson*, 107 Iowa, 644; *Cameron v. Fellows*, 109 Iowa, 534; *Garrett v. Bishop*, 113 Iowa, 23; *Lindsay v. District Court*, 75 Iowa, 509.

Proceeding now to a consideration of the question as made in the case before us, and keeping in mind that the specific charge in the information is that through one Marvin

2. CONTEMPT: evidence. this plaintiff attempted to influence the juror Fletcher, it is to be said that the case rests wholly

upon the following facts: That Marvin did have a conversation with Fletcher, in which the cause pending against this plaintiff was mentioned, and that improper statements were made by Marvin, is conceded. On the part of the prosecution, it was sought to connect this plaintiff with such improper matter by the testimony of one B. D. Stevenson, a newspaper reporter. He testified that, upon a report being made by a committee of the bar of Polk county having a relation to certain matters of alleged contempt, and, as we assume, involving the name of this plaintiff, he sought an interview with plaintiff. The latter told him that "he did not know that he had anything to say in the matter; * * * that there was nothing in the matter particular." The witness does not pretend that any alleged conversation between Marvin and Fletcher was referred to during the interview, and was not willing to testify that the name of Marvin was even mentioned. As disclosed by the record, all that by any possibility could be claimed as of any materiality was that after refusing to talk about his own case, plaintiff stated a suppositious case, in substance as follows: If one man happening to meet another, who was a jurymen, should say,

“ ‘ Well, do what you can for my friend Wells,’ or something of that nature,” if that was bribery, he expected bribery had been practiced. Plaintiff was a witness on his own behalf, and stated that before his case was to come up in court he went to Marvin, who was an employé of the United States Express Company, to make inquiry concerning a man by the name of Fletcher, also an employé of the said company, whom he understood had been drawn on the jury. He says he did this to ascertain if there was any reason for challenging Fletcher should he be drawn on the jury in his case. He then testified that Marvin pointed out Fletcher, and that he (plaintiff) responded by saying that he did not think such was the man. “ Marvin says, ‘ Perhaps it is his father.’ I said: ‘ Very likely. What kind of a man is he, and where does he live?’ He said, ‘ He lives out on Fifth street.’ I asked Marvin if he thought he had been against me politically. He said, ‘ I will see.’ * * * Marvin did not say that he would see Fletcher. He said he would see; or, in other words, he would find out — find out if he was against me politically. I did not understand, when I left there, that he was going to see Fletcher, the jurymen. I did not know that he did see him until Fletcher testified to it in court.”

Foregoing is the substance of all the testimony relied upon to support the judgment. To our minds, it is wholly insufficient to make out a case of contempt. That plaintiff had the right to do and say what he admits having said and done must be admitted. So far there is not even room for controversy. The stating of a suppositious case by plaintiff to a newspaper reporter, standing alone, cannot be accepted as a confession tending in any degree to prove his guilt of the offense charged in the information. Contempt proceedings are in their nature criminal, and, before a conviction is had, the proof of guilt should be clear and satisfactory.

We are agreed that the judgment entered by the district court should be and it is ordered *annulled*.

MICHAEL DRADY, Plaintiff, v. THE DISTRICT COURT OF
POLK COUNTY, and JOSIAH GIVEN, Judge thereof, De-
fendants.

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| 126 | 345 |
| 1126 | 356 |
| 128 | 360 |
| 126 | 345 |
| 132 | 685 |
| 126 | 345 |
| 1140 | 681 |
| 1141 | 534 |

Certiorari: CONTEMPT: STATUTES. The statutes defining contempts
1 and prescribing the procedure for their punishment, cover the
whole of the subject-matter, and therefore operate to repeal the
common law on the subject.

Contempt: PROCEDURE. Under the Code, a denial by the accused of
2 the contempt charged does not operate, as at common law, to
purge him of the offense, but the court is to determine by a trial
the facts put in issue by the answer; and a contrary view is not
indicated by the provisions of Code, section 2407, relating to the
violation of a liquor nuisance injunction.

Constitutional law: CONTEMPT: STATUTES. The provisions of the
3 statute prescribing the procedure for the punishment of construc-
tive contempts are not unconstitutional as depriving courts of
their inherent power to punish contempt, but rather provide
regulations for the exercise thereof; nor do they deprive the
accused of any constitutional right or punish him without due
process of law.

Trial: JURISDICTION. A contempt proceeding may be tried by any
4 judge of the court in which the offense was committed.

Admission of evidence: PREJUDICE. Where there was other compe-
5 tent evidence to support a conviction for contempt, the admission
of a transcript of accused's testimony before an investigating com-
mittee of the bar, was not prejudicial error.

Contempt: EVIDENCE. In a proceeding to punish for contempt for
6 attempting to influence the verdict of a juror, the evidence is re-
viewed and held sufficient to support a judgment of guilty.

THURSDAY, JANUARY 12, 1905.

CERTIORARI proceedings originally brought in this court
to review the action of the district court of Polk county, Hon.
Josiah Given, Judge, in respect of certain contempt pro-
ceedings had in that court, and wherein this plaintiff was

adjudged guilty of a contempt of court. The opinion states the case.— *Dismissed.*

Parrish, Dowell & Parrish and Bowen & Brockett, for plaintiff.

Wm. H. Baily, Thos. A. Cheshire, and others, for defendants.

BISHOP, J.— The return to the writ issued shows that in October, 1903, an information was filed in the district court of Polk county charging this plaintiff, Michael Drady, with a contempt of court, for that, well knowing that one M. V. Kennedy was a juror duly summoned, drawn, and sworn as one of the jury in a civil cause wherein one Pflanz was plaintiff and the Iowa Telephone Company was defendant, then pending and on trial in the said court, did willfully and knowingly attempt to improperly influence said juror to render a verdict in said cause by conversing with said juror about said cause, the merits thereof, and the verdict to be rendered therein, and informing said juror as to the nature and amount of the verdict in said cause expected by defendant in said cause, and soliciting and requesting said juror to render a verdict in said cause favorable to said telephone company, and soliciting and requesting said juror to see one Edward H. Hunter in respect to the verdict to be rendered in said cause; contrary to the statute, etc. Upon the filing of such information, a rule issued, and in response thereto Drady appeared, and made answer in writing, and under oath, in which he denied all and singular the allegations of fact contained in the information. Thereafter the case came on for hearing before Hon. Josiah Given, one of the judges of said district court, whereupon a motion was made and filed, asking that he (Drady) be discharged, for that, having answered, denying without equivocation the facts alleged in the information, he had purged himself of the charge of con-

tempt. This motion was overruled. Thereupon the attorneys for Drady objected to the case being heard before Judge Given for the reason that the case of Pflanz v. Telephone Company, out of which the alleged contempt grew, was pending and tried before Hon. A. H. McVey, one of the judges of said district court; that said action was one by ordinary proceedings, and that such matter of alleged contempt should be heard before Judge McVey, he still being one of the judges of said court. This motion was also overruled. Thereupon a trial was had resulting in a finding of guilt, and the entry of judgment for a fine and costs.

The contentions for error relied upon by plaintiff are four in number, and they may be stated as follows: (1) The court erred in overruling the motion for discharge and in proceeding to a trial of said cause upon its merits. (2) The court erred in denying the application of plaintiff to have said cause transferred to Judge McVey for hearing. (3) The court erred in the admission of certain evidence, particular reference to which will be made in the further course of this opinion. (4) The competent evidence was not sufficient to authorize the judgment. These several matters may be taken up and disposed of in the order of their statement.

I. The information filed in the district court was bottomed upon subdivision 4 of section 4461 of the Code, which provides that any court may punish, as for a contempt, bribing or attempting to bribe, or in any other manner improperly influencing or attempting to influence, a juror to render a verdict. The charge made in the information is of a criminal constructive contempt; that is, a contempt criminal because directed against the dignity and authority of the court, and constructive because involving an alleged act or conduct not occurring in the immediate presence or within the hearing of the court. It is agreed between counsel representing the respective parties that, whatever may have been the rule respecting civil or equi-

1. CONTEMPT:
statutes.

table contempts, at common law a person charged with a criminal constructive contempt might, upon being brought in, purge himself by making answer under oath denying in unequivocal terms the commission of the act charged as constituting the contempt. Having done this, it was error for the court to refuse to dismiss him upon his motion therefor; in other words, his denial under oath could not be traversed. If false in fact, the government was remitted to a prosecution for perjury. It is the contention of counsel for the defendants, however, that the common-law rule in the respect under consideration has been abolished in this State, and that the whole matter as related to the procedure and judgment in cases of contempt is now regulated by statute. Upon the proposition thus advanced counsel for plaintiff take issue, and it is the argument that not only has the legislature not undertaken to abolish the rule as it obtained at common law, but that it has no constitutional power to do so.

The doctrine that courts possess the inherent power to take cognizance of and punish contempts is as old, relatively speaking, as the establishment of the courts themselves. Formerly it was left wholly with the courts to determine what acts or omissions should be held to constitute contempts, to prescribe the method of procedure in such cases, and to determine upon the punishment to be inflicted. Having this in mind, we may proceed to inquire into the scope and effect of the statutory provisions on the subject. With the adoption of the Code of 1851 the legislature of this State saw fit to take up the subject in general, and by chapter 94 not only defined what acts or omissions were to be deemed contempts, but prescribed a course of procedure to be followed in contempt cases, and the character and extent of the punishment that might be inflicted. In all material respects the course of procedure then prescribed has remained unchanged to the present time. Code 1897, chapter 17, title 21. As related to constructive contempts — and no attempt is made to distinguish between civil and criminal contempts

— the statute, in substance, provides for the filing of an affidavit or information, and the issuance of a rule or warrant to secure the attendance of the alleged contemnor. Upon being brought in, the accused may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved. If upon the hearing the court act upon evidence given by others, such evidence must be in writing, and be filed and preserved; if upon its own knowledge in the premises, a statement of the facts must be entered on the records, or be filed and preserved where the court keeps no record. If the accused be adjudged guilty, and is committed, the warrant must state the particular facts and circumstances on which the court acted, and whether the same was within the knowledge of the court or was proved by witnesses. It will thus be observed that the lawmaking power undertook to cover the whole field as related to the subject, and it is general doctrine that a statute which treats of the whole of any subject-matter is a constructive repeal of the common law on that subject. 26 Am. & Eng. Ency. 665. In view of this, and conceding the legislative power, it follows that the courts must be governed in all cases by the provisions of the statute, and they may not resort to the common law either to find subjects of contempt or to justify a course of procedure other than as by the statute prescribed. The precise point may not have been raised before, but, as we think, all our previous holdings having relation to the subject are in harmony with the conclusion thus reached. This much, at least, is to be said: that all the cases recognize the statute as authoritative upon the subject. *First Cong. Church v. Muscatine*, 2 Iowa, 69; *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *State v. Myers*, 44 Iowa, 580; *Russell v. French*, 67 Iowa, 102; *Dorgan v. Granger*, 76 Iowa, 156.

Proceeding to a construction of the statute, it seems clear enough that an innovation on the procedure at common law was intended. The statute does not say that the written

explanation filed by the accused, if in effect a denial, shall operate to preclude any further inquiry on the part of the court. Nor does it say that the method of procedure provided shall have application to one class of contempts, but not to another. If such had been intended, it would have been easy enough to have said so. Moreover, the mandatory provision that the evidence must be taken in writing and preserved is general and it admits of no exceptions. Such provision of itself, as we think, contemplates a trial, and there could be no trial save upon a denial of guilt. A construction of the statute conformably to the contention of plaintiff would lead to our saying that in the case of criminal contempts the requirement goes no farther than to make necessary the taking and preserving of the evidence in those cases only where the accused either stands dumb or fails to move for his discharge. Having legislated upon the subject generally, and there being no provision that a person accused may try himself, we think it was intended that the court should in all cases proceed to determine the essential facts of the charge put in issue by the answer.

We cannot agree with counsel for plaintiff that a contrary view is indicated by the provisions of the act of the Twenty-First General Assembly, now section 2407 of the Code. That statute has direct relation to the violation of an injunction issued to restrain the maintenance of an intoxicating liquor nuisance. It provides for the filing of an information, and in direct terms for a trial, and this upon affidavits, or, when demanded by either party, upon the production and oral examination of witnesses. The statute is additional to the general chapter on the subject of contempts, and, in our view, is in perfect harmony therewith.

We may now take note of the contention of counsel for plaintiff to the effect that the statute — and giving to it force of operation as above indicated — must be held void as in excess of the power of the legislature. The argument is put

upon two grounds: First, that it is an attempt to interfere with the inherent power of the courts to judge of and punish contempts; second, the legislature cannot confer power upon the courts to try one accused of a criminal constructive contempt who has purged himself by answer, as such would amount to a denial of due process of law and of the right to trial by jury, as guarantied under the Constitution. While ready to express our appreciation of the great industry and care which mark the brief and argument of counsel, we cannot admit of soundness in the conclusion therein reached. Now, the district court is a constitutional court, and primarily it derives its authority to act from the provisions of the fundamental law of the State. That such courts have from time immemorial possessed the inherent power to punish for contempts is conceded. But while jurisdiction in all matters civil and criminal is conferred upon the court, the framers of the Constitution provided that such jurisdiction should be exercised in the manner prescribed by the co-ordinate law-making branch of the government. This is what was attempted by the statute in question. There is no ground upon which to plant the assertion that here was an attempt on the part of the legislature to deprive the courts of their inherent power; on the contrary, the aim was to provide regulations for the exercise thereof. This, according to the better weight of authority, it might do, and, as we think, to a certain extent it must do. This conclusion finds support in the following cases: *Arnold v. Com.*, 80 Ky. 135; *State v. Morrill*, 16 Ark. 384; *Middlebrook v. State*, 43 Conn. 257 (21 Am. Rep. 650); *People v. Wilson*, 64 Ill. 195 (16 Am. Rep. 528); *Cheadle v. State*, 110 Ind. 301 (11 N. E. Rep. 426, 59 Am. Rep. 199); *Holman v. State*, 105 Ind. 513 (5 N. E. Rep. 556). Our own cases give recognition tacitly to the doctrine thus stated. *Dunham v. State*, 6 Iowa, 257; *State v. Folsom*, 34 Iowa, 583; *Lutz v. Aylesworth*, 66 Iowa, 629; *Jordan v. Circuit Court*, 69 Iowa, 177; *Field v. Thornell*, 106 Iowa, 7.

3. CONSTITUTIONAL LAW: contempt; statutes.

It has been said by many very respectable courts that, inasmuch as the power to punish for contempts comes into existence inherently with the establishment of the court itself, and not by virtue of any provision of statute, it is not within the province of the legislature either to take away the power, or, under the guise of regulation, to render it ineffective. And we are not prepared to say that this is not so. As was said in *Dunham v. State, supra*, in speaking of the statute: "We can conceive of no possible state of case in which the exercise of this power might become necessary for the protection of the court or the due administration of the law that is not covered by these provisions. If such a case should by possibility arise, we would not say that by virtue of its inherent power the punishment might not be inflicted." It is sufficient to say in the instant case that the argument of counsel is not in the nature of a criticism in this respect upon the present statute, and we may add that for more than fifty years the courts of this State have found the provisions thereof to be generally effective in the rare cases in which assaults upon their dignity and authority have been made.

The further contention of plaintiff that the statute is violative of his constitutional rights cannot be sustained. It must be remembered that the proceeding is not one to punish the offense alleged as an offense against an established law of the State. For the offense against the State an offender may be indicted, tried, and, upon conviction, punished, irrespective of any proceedings had for contempt. And manifestly due process of law would require that upon such trial a jury should be impaneled. Contempt has relation solely to an offense against the court itself, its dignity and authority. And whether or not such an offense has been committed has always been held to be determinable solely by the court affected thereby. Due process of law means according to the established forms of law. And the processes of the law are always subject to change as exigencies may require, and of this no one may complain as long as no constitutional right is

violated. Now, at common law an alleged contemnor had no inherent right to a discharge upon filing an unequivocal denial of the charge made. At best an order for his discharge was pursuant simply to a method of procedure adopted by the courts in such cases. The effect thereof was to regard the offense against the court as satisfied by the denial, and leaving the accused to a prosecution for perjury if he swore falsely, and also to a prosecution for the offense when vulnerable thereto under the law of the State relating to crimes. The statute goes no farther than to change the method of procedure. It determines what shall now be regarded as due process of law, and it takes away no inherent right possessed by a person accused. Nor does it confer any rights not enumerated. The right to a trial by jury never existed in such cases, and the statute neither in terms nor by inference confers such right. The reason therefor is obvious, and we need not pursue the subject further. *Ex parte Grace*, 12 Iowa, 208; *Manderscheid v. District Court*, 69 Iowa, 240; *McDonnell v. Henderson*, 74 Iowa, 619, 9 Cyc. 47, and cases cited.

II. We think there was no error in the refusal by the court, as presided over by Judge Given, to transfer the case for trial before Judge McVey. By statute, the Ninth District consists of Polk county, and the district

^{4. TRIAL: juris-}
^{diction.} has four judges. There is, then, one court with four judges, each one of whom may transact any business within the jurisdiction of the court. The offense charged was against the court, and might, therefore, be heard by any judge who was in fact presiding over such court. It is immaterial that the particular case on which the juror was serving was upon trial before Judge McVey, and this is particularly true as the offense was not in any sense personal to him.

III. As we think, no substantial prejudice resulted from the admission of a transcript of the evidence given by this plaintiff, Drady, on an examination before the bar com-

mittee of Polk county. In any event, there was sufficient competent evidence to warrant the judgment, and we need not farther consider the error assigned based upon the ruling of the court under which such transcript was received in evidence.

5. ADMISSION
OF EVIDENCE:
prejudice.

IV. The evidence shows that Drady and Kennedy were old-time and intimate friends, and that the latter was a juror on the telephone company case; that while said case was on trial, and during an intermission of court, Drady approached Kennedy, and knowing that he was so acting as a juror, talked with him about the verdict to be rendered in the case, saying that, while the company expected an adverse verdict, it wanted the same cut down, and that E. H. Hunter had expressed a desire to see him. It appears that Mr. Hunter had formerly been connected with and in the service of the telephone company, and that he was at the time in question, and in a certain respect, connected in business with the attorney who represented the telephone company, and that his offices connected with or were adjacent to the offices of said attorney. The record does not make it appear, however, that the conduct of Drady was authorized by Hunter, or that he or the attorney for the telephone company had knowledge respecting such conduct prior to or at the time of the occurrence thereof. To the credit of Kennedy it is to be said that he became angry at being thus approached, and not only refused to go and see what Hunter wanted, but declined to discuss the matter of the verdict that should be rendered in said case.

6. CONTEMPT:
evidence.

From the foregoing statement of facts, it must be apparent that within the meaning of the statute there was an attempt on the part of Drady to improperly influence a juror to render a verdict. Therefrom it follows that the judgment of the district court was right and it should be upheld. Accordingly it is ordered that the present proceedings be, and the same are, *dismissed*.

F. A. MARVIN, Plaintiff, v. THE DISTRICT COURT OF POLK
COUNTY, and JOSIAH GIVEN, Judge thereof.

Certiorari: CONTEMPT: INFLUENCING JUROR. The court has power under Code, section 4461, to punish for contempt an attempt to influence a juror of the general panel made prior to the time he was sworn to try the particular case.

THURSDAY, JANUARY 12, 1905.

CERTIORARI proceedings originally brought in this court to review the action of the district court of Polk county, Hon. Josiah Given, Judge, in respect of certain contempt proceedings had in that court, and wherein this plaintiff was adjudged to be guilty of a contempt of court, and by the judgment ordered to pay a fine and costs.— *Dismissed.*

Connor & Weaver and Bremner & Shuler, for plaintiff.

W. H. Baily and others, for defendants.

BISHOP, J.—The return to the writ issued out of this court makes it appear that in October, 1903, an information was filed in the district court of Polk county charging this plaintiff with a contempt of court, for that well knowing that one John Fletcher was a juror duly summoned, drawn and sworn as one of a jury in a civil case wherein one Lewis was plaintiff and Jesse O. Wells was defendant, then pending and on trial in said district court, he did willfully and knowingly attempt to improperly influence said juror to render a verdict in said cause by conversing with him about said cause, and the merits thereof, and soliciting said juror to favor the defendant in said cause in the verdict to be rendered therein. Upon the filing of such information a rule issued, and in response thereto this plaintiff appeared, and made answer in

writing and under oath, in which he denied all and singular the allegations in the information contained. A motion for discharge based upon the denials contained in the answer was made and overruled, and thereupon trial was had on oral testimony produced in open court, resulting in a finding of guilt and the entry of judgment for a fine and costs.

The contentions of plaintiff in this court are, in substance, two: First, that the district court erred in overruling the motion to discharge; second, in finding plaintiff guilty, for the reason that the evidence shows that at the time it is alleged plaintiff attempted to improperly influence said Fletcher he was not a juror sworn in said case, but a member of the regular panel, and there was therefore a fatal variance, and a failure of proof.

I. The questions arising out of the motion to discharge are identical in all respects with those raised and disposed of adversely to the contentions of plaintiff in the case of *M. Drady v. District Court*, 126 Iowa, 345, an opinion in which case has been filed at the present term. We need go no farther than to say that in the respect now in question this case must be ruled by the holding in the case cited.

II. By section 4461 of the Code it is provided that "any court of record may punish the following acts or omissions as contempts: * * * (4) Bribing, attempting to bribe, or in any other manner improperly influencing or attempting to influence a juror to render a verdict, or suborning or attempting to suborn a witness." Counsel for plaintiff make the contention that the word "juror," as used in said section, does not embrace members of the general jury panel who have not been sworn to try an issue of fact in a particular case. We think there is no merit in the contention. What the legislature intended was to prevent any attempt to influence the results of jury trials by improper means. A jury in each case is made up, of course, from the persons drawn and summoned to act as jurors, and it would be absurd to say that one having a case for trial might resort to any system of

"jury fixing," or make use of any means in his power to make certain the result of his case, without incurring liability for contempt, provided his work was done before a jury had actually been drawn and sworn to try his case. As well say that within the law of contempts there could be no such thing as suborning a witness until after he had been actually sworn as such. To ascribe to the legislature any such intention would require a presumption altogether too violent to be indulged in. The contention that there was a failure of proof because that Fletcher had not at the time been sworn as a juror to try the Wells case is also without merit. The essential element of the charge made was an attempt to improperly influence the course of justice as administered through the medium of a jury trial; that such attempt was made in anticipation that the juror approached might have a voice in determining what the verdict in a particular case should be. The intent behind the act and the offensiveness thereof were the same whether the juror had taken his seat in the jury box or was in waiting subject to a call for service. In either case the act was within the prohibition of the statute. The variance was therefore immaterial. The evidence taken upon the trial was conclusive as to the guilt of plaintiff, and we are not asked to disturb the finding of the district court on that ground.— *Dismissed.*

EDWARD H. HUNTER, Plaintiff, v. THE DISTRICT COURT OF
POLK COUNTY, and JOSIAH GIVEN, Judge thereof.

Certiorari: CONTEMPT: TRIAL: EVIDENCE. In a contempt proceeding for attempting to influence a juror, the admission of a transcript of evidence taken upon the trial of another cause, based largely upon the same state of facts, which included a transcript of testimony before a committee of the bar association, was error, the defendant being entitled to a trial under the statute, and, not having been a party to the other case nor the committee investigation, such matters were hearsay and inadmissible.

THURSDAY, JANUARY 12, 1905.

CERTIORARI proceedings originally brought in this court to review the action of the district court of Polk county (Hon. Josiah Given, judge) in respect of certain contempt proceedings had in that court, and wherein this plaintiff was adjudged guilty of a contempt of court. The opinion states the case.—*Annulled.*

Parrish, Dowell & Parrish and Bowen & Brockett, for plaintiff.

Thos. A. Cheshire, Wm. H. Baily, and others, for defendants.

BISHOP, J.—The return to the writ issued shows that in October, 1903, an information was filed in the district court of Polk county charging this plaintiff with a contempt of court, for that, well knowing that one M. V. Kennedy was a juror duly summoned, drawn, and sworn as one of the jury in a civil cause wherein one Pflanz was plaintiff, and the Iowa Telephone Company was defendant, then pending and on trial in said court, he did willfully and knowingly attempt to improperly influence said juror to render a verdict in said cause, by causing and procuring one M. H. Drady to converse with said juror about said cause, the merits thereof, and the verdict to be rendered therein, and to inform said juror as to the nature and amount of the verdict in said cause expected and desired by said company, and requesting said juror to render a verdict favorable to said company, and requesting said juror to see said Hunter in respect to the verdict to be rendered in said cause. Upon filing of such information, a rule issued, and in response thereto this plaintiff appeared and made answer in writing and under oath, in which he denied, all and singular, the allegations in the information contained. A motion for discharge based

upon the denials contained in the answer having been overruled, a trial was had, resulting in a finding of guilty, and the entry of judgment for a fine and costs. It further appears from the return that upon the trial in the district court, and at the beginning thereof, the court, on its own motion, made the following announcement and order: "It being apparent to the court from the informations filed in the case of *The State v. Drady* and *The State v. Hunter* that these two cases rest, in part, at least, upon the same state of facts, as claimed, and the testimony in the case of *The State v. Drady* having been taken, it is the order of the court, made to avoid an unnecessary consumption of time, that the testimony in the case of *The State v. Drady* shall be considered in this case as taken therein, subject to the objections, rulings, and exceptions made on the taking of that testimony, and subject to the further right of the defendant, Hunter, to object to any part thereof as being incompetent, immaterial, or irrelevant, as relating to him." To this order both parties objected and took exception. Thereupon the trial proceeded, and a submission of the case was taken upon the oral testimony of two witnesses, and a transcript of the evidence taken upon the trial of the Drady case. It appears that included in the latter was a document in writing purporting to be a transcript of evidence given under oath by M. Drady before a committee of the bar of Polk county appointed by the court to make investigation in respect of alleged attempts theretofore made to influence jurors in attendance upon said court.

The contention is now made in this court by counsel for plaintiff that the admission of the transcript of the evidence of the various witnesses who testified in the Drady case, and especially the transcript of the evidence given by Drady before the bar committee, as evidence in the instant case, was unauthorized and illegal, and that such transcripts were wholly incompetent and irrelevant as evidence upon the trial of the case against this plaintiff; further, that there was not

sufficient competent evidence to authorize the judgment against this plaintiff.

Confessedly, the oral testimony introduced upon the trial, taken by itself, was insufficient to warrant a finding of contempt as charged in the information. We are brought, then, to the inquiry, were the transcripts put in evidence by the court on its own motion competent? We think this question must be answered in the negative. Especially in cases involving an alleged constructive contempt, the statutes of this State contemplate a trial. Code, section 4466. And such is our holding in the cases of *Wells v. District Court*, 126 Iowa, 340, and *Drady v. District Court*, 126 Iowa, 345. Now, a trial means an investigation into the facts according to the forms of law. It means that, in character, the evidence brought forward in proof of the charge made must be competent and relevant to the issue, and this according to the established rules relating to the admissibility of evidence. Whether Hunter had the right to have the witnesses confront him in person, we need not decide. To say the least, he had the right to have the testimony taken under the issue made by his answer, and to conduct the examination and cross-examination of the witnesses, make objections, etc., according to his own conception of his rights and interests. He was not a party to the *Drady Case*, nor to the bar committee investigation; and certainly there is no statute provision, nor is there any rule at common law recognized in this State, under which his conviction could be accomplished by confronting him with a case previously made up on an issue between other parties, and saving to him only the right to make additional objections if he was so advised. In our view, the recitals of fact contained in the transcripts could not bind any one aside from the immediate parties to the proceeding in which the evidence was taken. To all others they were as hearsay, and could not, therefore, be admissible in proof of any substantive fact in issue in any trial, civil or criminal. Our conclusion has support in the following

authorities: *State v. Van Winkle*, 80 Iowa, 15; *Southern W. L. Co. v. Haas*, 73 Iowa, 399; 11 Am. & Eng. Enc. of Law, 526, and cases cited.

It follows from what we have said that the judgment entered by the district court was unauthorized and void, and that the same should be annulled. It is so ordered.—*Annulled.*

C. F. EARL, Appellee, v. THE CITY OF CEDAR RAPIDS, CHAS. KOSEK, FRANK DLASK, and GODFREY DLASK,
Appellants.

Defective sidewalks: LIABILITY OF PROPERTY OWNER AND CITY: EVIDENCE.

1 DENCE The owner of a building and his tenants who maintain a cellarway from a traveled street to the basement, which extends into the street, and who leave the trap door thereto open without railing or guard, are negligent; and the liability of the city for an injury therefrom is a question of fact dependent upon all the circumstances. In the instant case all defendants were properly found to be negligent.

Negligence: LIABILITY OF CITY. A city is liable for an injury re-

2 sulting from the negligent maintenance of a private cellarway which extends into a traveled street, whether the injury results from an approach from the street or the abutting property.

Contributory negligence: ORDINARY CARE: EVIDENCE. A pedestrian

3 is not required to be on the lookout for hidden dangers in the street: He is only required to walk with his eyes open observing his natural course, and in the usual manner. A finding of ordinary care is sustained.

Review of directed verdict. A motion to direct a verdict will only

4 be reviewed on the grounds on which it was submitted in the trial court.

Appeal from Cedar Rapids Superior Court.—HON. J. H. ROTHROCK, Judge.

FRIDAY, JANUARY 13, 1905.

ACTION at law to recover damages for injuries received by plaintiff in falling into a cellarway in or near one of the

streets of the defendant city. The defendants, other than the city, are the owners and occupants of abutting property, who constructed and maintained the alleged defect. Trial to a jury; verdict and judgment for plaintiff against all the defendants; defendants appeal.—*Affirmed*.

J. M. Hughes and Bingham & Mekota, for appellants.

Rickel, Crocker & Tourtellot, for appellee.

DEEMER, J.—Abutting on what is known as Sixteenth avenue west, in the defendant city, is a building known as No. 73, owned, occupied, and used by the defendants, other than the city, as and for a saloon. The front of the building was about two feet from the street line, but the space, except as we shall hereafter notice, was covered with brick, as was the sidewalk in the street, and there was nothing to mark the exact place of the lot line. Immediately in front of the door to the saloon, which was in the center of the building, was a cement step or flagstone, about three feet wide, and five or six feet long. Immediately to the west of this step was a cellar or areaway, three feet and one inch wide and six feet long, extending along the side of the building, and running out into the sidewalk in the street at least one foot. This cellarway had a trapdoor, which, when closed, was on a level with the street and the lot outside the street. This trapdoor swung toward the building, and, when opened, rested against the side of the building. There were no barriers or railings around this areaway, and nothing to warn travelers of danger when the door was open. This condition had existed for at least two years prior to the time plaintiff received his injuries. At about 7:45 in the evening of March 2, 1903, plaintiff went into the saloon to get a drink; accomplishing his purpose, plaintiff started to leave the saloon, stepped from the door onto the flagstone, and, wishing to go west, started in that direction, and, stepping from the flagstone,

1. DEFECTIVE
SIDEWALK: lia-
bility of prop-
erty owner
and city; evi-
dence.

landed at the bottom of the areaway — the trapdoor being open — and received the injuries of which he complains.

The evidence shows that the cellar to this building was used for storing beer and ice, and that the trapdoor for a considerable period had been open at least once, and sometimes twice, a day. There was also testimony which tended to show that this door was frequently left open both day and night before the accident occurred. Some of the witnesses say that they found it open at least three times a week for some months prior to the time plaintiff was injured. There is no doubt this arrangement in its unguarded condition was extremely dangerous. The flagstone and the areaway extended some distance into the street, and there was nothing to denote the line of demarcation between the lot and the street. But for the flagstone, the lot and street were upon a common level, were all improved as a part of the street, and in fact, the sidewalk extended up to the front wall of the building. The trapdoor, when closed, was on a level with the street. There were no guards or barriers of any kind to prevent persons from falling into the opening when the door was raised. That the owner of the property and the tenants who used it were negligent, there can be no doubt. Whether or not the city was negligent was a question of fact for a jury, depending, of course, upon the method of construction and use made of the premises, and the number of times the door had been left open and unguarded, and all other relevant facts and circumstances in the case. This issue was submitted to the jury, and it found all defendants negligent.

But it is contended that, as the areaway was not wholly within the street, and as plaintiff did not approach it from the street, but from abutting property, the city owed him

(plaintiff) no duty, and was not guilty of ac-

2. NEGLIGENCE:
liability of
city.

tionable negligence. We cannot agree to this

construction. Both the flagstone and the areaway were partially in the street, and the opening was such

as to constitute a menace to all who might be using the street. When plaintiff stepped from the flagstone he was in the street, and, on account of the use made of that part of the lot and the front of the building, and the nature of the improvements thereon, the defendant city did owe a duty to persons rightfully thereon. Even an excavation entirely outside the street line, but so near thereto as to endanger the traveling public, is held to be a nuisance, and the continuance or maintenance thereof actionable. *Rowell v. Williams*, 29 Iowa 210; *Smith v. Leavenworth*, 15 Kan. 81; *City of Abilene v. Cowperthwait*, 52 Kan. 324 (34 Pac. Rep. 795); *Niblett v. Nashville*, 12 Heisk. (Tenn.) 684 (27 Am. Rep. 755); *City v. Hafers*, 59 Ga. 151; *Peoria v. Simpson*, 110 Ill. 294 (51 Am. St. Rep. 683); *Grove v. Kansas City*, 75 Mo. 672; *Fitzgerald v. Berlin*, 51 Wis. 81 (7 N. W. Rep. 836; 37 Am. Rep. 814); *Woods v. Groton*, 111 Mass. 357; *Boucher v. City*, 40 Conn. 456. On account of the nature of the defect, it is immaterial that plaintiff was coming out of the saloon to get upon the sidewalk. As soon as he emerged therefrom and attempted to step from the flagstone onto what appeared to be, and in fact was, a part of the street, he was entitled to protection. The case differs from those where one is injured while upon private property in attempting to reach the street. The city in such cases owes the traveler no duty. But when he gets upon the street, or upon what from the nature of the construction appears to be part of the street, he is entitled to the protecting care of the city. It is this which distinguishes the case from *Goodin v. City*, 55 Iowa, 67, relied upon by appellants. To all intents and purposes plaintiff was upon the street when he received his injuries.

II. The point most relied upon by appellants for a reversal is that plaintiff was guilty of contributory negligence in not using his senses to discover the defect. There is no evidence that he knew there was a trapdoor at the place in question. He had a right, therefore, to assume that there

were no such pitfalls as this at any place where he might rightfully travel. The night was dark, and plaintiff testified that he looked to see where he was going as much as he ever did; that he stepped out of the building naturally, and looked where he was going, and that he did not see the hole, and had no previous knowledge of the cellarway. The trial court submitted the question of plaintiff's negligence to the jury, and it evidently found plaintiff was not negligent. The rule of this court is that the question of contributory negligence is generally for a jury. Even where one has notice of a defect in a sidewalk, he is not for that reason alone negligent in attempting to pass over it. Here there is no evidence that plaintiff had any notice or knowledge of the defect. But it is said that if he had used his senses he would have seen it. This was a question for the jury, and was properly submitted. Of course, one cannot close his eyes and walk blindly and heedlessly into a place of danger. On the other hand, he is not bound to be on the lookout for hidden dangers. All that is required of him is that he walk with his eyes open, observing his general course, and in the usual manner. *Barnes v. City of Marcus*, 96 Iowa, 682; *Lichtenberger v. Town of Mireden*, 91 Iowa, 45; *Evans v. Iowa City*, 125 Iowa, 202. The jury was justified in finding that plaintiff exercised the usual care of persons traveling upon public streets, and this is all that is required. An instruction holding plaintiff to too strict a duty in this respect was properly refused, and the ones given by the court were such as have been affirmed by this court in numerous cases. *Mathews v. Cedar Rapids*, 80 Iowa, 464, sustains our conclusions.

III. Contention is made that the trial court erred in not sustaining defendants' motion for a directed verdict for the city, on the ground that there was no evidence tending to show any negligence on its part. As this was not made a ground for the motion, we have nothing here to consider.

3. CONTRIBUTORY
NEGLIGENCE:
ordinary care;
evidence.

4. REVIEW OF DI-
RECTED VER-
DICT.

IV. Criticism is made of some of the instructions. These are hypercritical in character. The instructions, fairly and properly construed, are not objectionable. It would be of no benefit to the parties or to the profession to set them out, for they relate to matters arising on every such trial, and are the usual ones given in such cases.

There is no prejudicial error in the record, and the judgment is *affirmed*.

SARAH FOOTE and OTHERS, Appellants, v. LAURA DE POY and OTHERS, Appellees.

Divorce: SUPPORT OF CHILD. A husband is obligated to provide for
 1 his child given into the custody of his divorced wife, but no cause of action therefor arises until he has refused to respond to a just claim on him for the child's maintenance.

Duress: AVOIDANCE OF CONTRACT. Where a divorced husband, aged
 2 and enfeebled in body and mind and under temporary guardianship, is induced under circumstances indicating an unfair advantage and coercion to enter into a contract turning over a large part of his estate to a trustee for the benefit of a child, the custody of whom was awarded his divorced wife and for whom suitable provision was made in the divorce proceeding, his heirs at law, upon his death, may have the contract cancelled.

Approval of void contract. An order of court approving a void
 3 contract is of no effect, where its validity was not adjudicated.

Appeal from Linn District Court.—HON. H. M. REMLEY, Judge.

FRIDAY, JANUARY 13, 1905.

THE opinion states the case.—*Reversed*.

Deacon & Good, for appellants.

126 366
131 100

126 366
142 394

Rickel, Crocker & Tourtellot, for appellees.

WEAVER, J.—On June 24, 1896, William De Poy, a widower of advanced age, and Clara Knapp, both of Linn county, Iowa, were united in marriage. By his former marriage De Poy had become the father of several children, plaintiffs herein, and there was born to him of the second marriage, a daughter, who is the defendant Laura De Poy. On September 10, 1901, Clara De Poy obtained a decree of divorce from her husband, and by the same decree was awarded the custody of the child, Laura, and alimony in the sum of \$2,000, and attorney's fees. A little less than two months later the divorced wife began proceedings against her former husband, alleging that he had become enfeebled in body and mind, a prey to sharpers and abandoned women, and was wasting his estate, and, on these allegations, procured the appointment of a temporary guardian to take charge of the property. Immediately upon this action being taken, De Poy became very solicitous to obtain a dismissal of the proceedings against him, and visited his former wife to secure some sort of a settlement or compromise. As a result of these negotiations an agreement was finally reached whereby the district court was to appoint a trustee, whom De Poy should pay \$1,500 for the benefit of the child, Laura, and should also convey to her, or to the trustee for her use, certain town lots then owned by him. The money and property thus surrendered proved to be by far the larger part of the entire estate left to him after satisfying the judgment for alimony and paying off existing debts and incumbrances. The agreement, which was reduced to writing and approved by the court, does not in so many words provide that upon turning over the money and property the guardianship proceedings should be dismissed; but such an understanding is clearly to be implied therefrom, and such was the course of action pursued by the parties. The proceedings were continued in force, and the guardian remained in control of the

estate, until some time in December, when De Poy, through agents, made a sale of his equity in a farm for the purpose of raising the money with which to pay the \$1,500. The money was then by the purchaser of the land deposited with the clerk of the district court, "to be used for the purpose of releasing the temporary guardianship of William De Poy." The payment being made, the guardian was discharged and De Poy was restored to the remnant of his estate. Soon thereafter the older children of De Poy, or some of them, instituted new proceedings for the appointment of a guardian over him, and in April, 1902, death kindly intervened in the old man's behalf. This action was then begun to set aside the trust arrangement made by the deceased, as hereinbefore stated, on the ground that at the date thereof he was mentally incompetent to make a contract, and that the trust agreement was obtained by fraud and duress. The district court found for the defendants, and dismissed the petition, and plaintiffs appeal.

No one, we think, can read the record in this case, and not be strongly impressed with the conviction that William De Poy at the time of this transaction was at least very much weakened in body and mind. Whether his imbecility had so far progressed as to wholly incapacitate him from making a valid contract, if left to act freely and without undue influence of any kind, is not perhaps so clear, and we think it not necessary to decide. It is very clear that he was sufficiently weak to be the easy mark of imposition, and that his former wife, by taking advantage of that weakness, and by holding the guardianship over him *in terrorem*, obtained an agreement which was essentially unconscionable. In the divorce proceeding, then but just ended, she had been awarded alimony, fixed, as we must presume, in due proportion to the husband's financial condition, and with reference to the fact that she was to have the custody of the child. To pay that alimony, De Poy added another to the numerous incumbrances on his property.

1. DIVORCE:
support of
child.

While the divorce did not cancel his obligations as a parent, there was no present occasion justifying a demand upon him for further immediate contribution to the child's support, and certainly the law recognizes no right in the child or in the divorced wife to compel him to set aside the greater part, or, indeed, any part, of his estate to provide against such child's future needs. It was to be presumed that if, during his lifetime, his young daughter should present any just claim upon him for her maintenance or education, he would respond thereto in proportion to his ability and her needs; and until he refused so to do, neither she, nor any one for her, had any right of action against him.

In his weakened condition, De Poy was naturally much agitated over the guardianship proceedings. In his anxiety, he appears to have been ready to consent to almost any sacrifice to effect that purpose, and his former wife

2. **DURASS:**
avoidance of
contract.

seems to have been willing to reap all the advantage to be derived from the situation. Of the fact that the old man's surrender of the bulk of his estate to the trustee was the price of his liberation from guardianship, there can be no doubt. Such as we have already said, is the plain implication, though not the express terms, of the written agreement. Even in the absence of the writing, the admission of the former wife and of the counsel who assisted in the so-called settlement that it was the agreement or understanding that the guardianship proceedings should be dropped upon payment of the money, and the further fact that, as soon as De Poy had complied with the demand, he was promptly released, would force us to the same conclusion. Indeed, the whole story of the transactions from the inception of the proceedings until the discharge of the guardian is full of circumstances all tending to show that, while De Poy was quite evidently a fit subject for guardianship, the purpose of his former wife in instituting the proceedings was not to save the property for his use and support in his old age, but to obtain the largest possible por-

tion of his remaining estate for the benefit of her daughter, and when that purpose was accomplished her interest in the proceeding ceased.

It is suggested that, even if it be found that De Poy was to some extent of weakened mind and impaired judgment, he had the assistance of counsel, and we must assume that his interests were properly protected. We are not able to say from the record just what benefit or protection he had in this respect. Mr. J. H. Crosby testified that he is a practicing lawyer, and was consulted by De Poy. As a witness, he relates the interviews had with his client, and tells us that he himself arranged with opposing counsel, subject to the approval of De Poy and the court, for the payment of \$1,500, and that, upon such payment being made, the matter was to be dropped. It is Mr. Crosby's opinion that his client had sufficient "mental grasp to understand ordinary business," but, if such were the case, and he was not properly the subject of guardianship, it is not easy to understand why counsel should have thought it necessary to advise the payment of \$1,500 to secure the withdrawal of a proceeding which would have been quickly dismissed by the court upon a showing of his client's mental competency. On the other hand, if the client was mentally incompetent, it is equally certain that no court would have entered any order depriving him of the property in the manner provided for in this contract. Indeed, the testimony upon this feature of the case only adds weight to our conviction that counsel was mistaken in his estimate of the mental condition of his client, and that the contract was entered into under circumstances which demand its avoidance.

It is true that the claim of duress, in the original and technical sense of physical restraint, or actual or apprehended personal violence, is not proven. But there is a modified form of the doctrine of duress, recognized quite generally by the courts of this country, which operates to render void a contract exacted by a threatened illegal destruction or

loss or withholding of property. Mr. Cooley, in his work on Torts, p. 506; states the modern definition as follows: "Duress is a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury. Duress is either of the person or of the goods of the party.

* * * Duress of the goods consists in seizing by force, or withholding from the party entitled to it, the possession of personal property, and extorting something as a condition of release, or in demanding and taking property under color of legal authority, which in fact is either void, or for some other reason does not justify the demand." It has been said, in an opinion applying this principle, that "artifice and force differ only as modes of obtaining the assent of a contracting party, and a contract to which one assents through imposition or overpowering intimidation will be declared void on appeal to either a court of law or equity to enforce it. The question whether one executes a contract or deed with a mind and will sufficiently free to make the act binding is often difficult to determine, but for that purpose a court of equity, unrestrained by the more technical rules which govern courts of law in that respect, will consider all the circumstances from which rational inferences may be drawn, and will refuse its aid against one who, although apparently acting voluntarily, yet in fact appears to have executed a contract with a mind so subdued by harshness, cruelty, extreme distress, or apprehensions short of legal duress, as to overpower and control the will." *Central Bank v. Copeland*, 18 Md. 305 (81 Am. Dec. 597).

It has also been held that duress of property is a good plea to an action on a bond given under hard and pressing circumstances to secure the release of property seized in attachment proceedings oppressively instituted or conducted. *Collins v. Westbury*, 2 Bay, 211 (1 Am. Dec. 643); *Chandler v. Sangler*, 114 Mass. 364 (19 Am. Rep. 367); *Spairds v. Barrett*, 57 Ill. 289 (11 Am. Rep. 10); *Hackley v. Headley*, 45 Mich. 569 (8 N. W. Rep. 511). See also, *Carson v.*

Patterson, 33 Cal. 334; *Oliphant v. Markham*, 79 Tex. 543 (15 S. W. Rep. 569; 23 Am. St. Rep. 363); *Riggs v. Wilson*, 30 S. C. 172 (8 S. E. Rep. 848); *White v. Heylman*, 34 Pa. 142; *Crawford v. Cato*, 22 Ga. 594; *Vyne v. Glenn*, 41 Mich. 112 (1 N. W. Rep. 997), 2 Greenleaf evidence, section 121; *Adams v. Schiffa*, 11 Colo. 15 (17 Pac. Rep. 21; 7 Am. St. Rep. 202); *R. Co. v. Pattison*, 41 Ind. 312; *Radich v. Hutchins*, 95 U. S. 210 (24 L. Ed. 409) *Cleaveland v. Richardson*, 132 U. S. 318 (10 Sup. Ct. Rep. 100; 33 L. Ed. 384); *Chamberlin v. Reed*, 13 Me. 357 (29 Am. Dec. 506); *Joannin v. Ogilvie*, 49 Minn. 564 (52 N. W. Rep. 217; 16 L. R. A. 376; 32 Am. St. Rep. 581).

The rule to be deduced from these cases is especially applicable where the party on whom the imposition is alleged to have been practiced is, by reason of mental or physical infirmity, more easily influenced to act to his own injury. *Walbridge v. Arnold*, 21 Conn. 424; *Blair v. Coffman*, 2 Overt, 176 (5 Am. Dec. 659). In this respect the principle is closely related to that which is so frequently applied in avoiding contracts procured by undue influence. Indeed, undue influence may well be defined as moral duress or coercion. That William De Poy acted under such coercion, and was thereby led to make a contract which he would not have made if left to act of his own free will, there can be no reasonable doubt. By the proceedings against him he had been deprived of the right to possess and control his own property — a deprivation which it was threatened to make permanent. He was exceedingly desirous to avoid this result, and to be restored to the control of at least some portion of his estate, and, in his weakness, yielded to the plan of his release upon the terms tendered by the persons holding him at such disadvantage.

The order of the court approving the contract can have no effect in the premises. The court had no jurisdiction to order any disposition of the ward's property. No proceedings for such purpose were pending. If the contract was

valid, it did give the court the jurisdiction to appoint a trustee to receive the property, but the legal validity of that contract was in no manner considered or adjudicated. That question was first presented in the case now before us, and finding, as we do, that it was obtained under circumstances amounting to moral compulsion — the overpowering of a will which had been materially weakened by mental decay — we think it should be set aside and held for naught, and that the trustee in possession of the property should be held to account for and surrender the same to the administrator of the estate of William De Poy.

In reaching this conclusion, we may say it is very probable that no person active in securing the contract was moved by any malicious or wanton purpose to harass or despoil this feeble and broken old man. It may, indeed, be assumed that the divorced wife believed he was liable to waste or dispose of the remnant of his property, and that her motive in instituting the proceedings and obtaining the contract was not to enrich herself, but to obtain the best possible provision for her child. The motive was laudable enough, but the means by which that end was accomplished cannot be upheld. William De Poy was either mentally competent or incompetent. If competent, and the proceedings against him were begun to compel him to give up a part of his property, it was a flagrant abuse of the machinery of the law for the purpose of securing an unconscionable advantage. If he was incompetent, then a contract obtained from him, to his disadvantage, while he was actually under guardianship, by the very person who instituted the proceedings upon her solemn declaration that he was mentally unfit to transact business, can be viewed with no favor in a court of equity.

For the reasons stated, there must be a reversal, and the cause is remanded to the district court for the entry of a decree in harmony with this opinion. — *Reversed.*

S. APPROVAL OF
VOID CON-
TRACT.

CHAS. YOUNGHOE V. THE GRAIN SHIPPERS' MUTUAL FIRE
INSURANCE ASSOCIATION, Appellant.

Mutual fire insurance: COLLECTION OF ASSESSMENT: ESTOPPEL.

- 1 Where an agent of a mutual insurance company, having authority to collect contingent fees, collected a fee in excess of the legal one on an agreement with assured that he would not be liable for any further premium during the first year of the policy, and the amount thereof turned over to the insurance company exceeded the amount which it would have received if the legal contingent fee had been charged, and thereafter an assessment was made not greater than the excess over the legal contingent fee in the hands of the company; it is held, that the association could not defend a suit on the policy on the ground of nonpayment of the assessment, as it was estopped to deny the agent's authority to collect the excessive contingent fee, and had funds in its hands to satisfy the assessment.

Mutual insurance: NOTICE OF CONDITIONS. Where the delivery of

- 2 an insurance policy and the payment of a contingent fee are contemporaneous acts, the assured is not chargeable with knowledge of the provisions of the policy at the time the fee was paid.

Nonpayment of assessments: FORFEITURE OF POLICY. Where an in-

- 3 surance company has funds in its hands belonging to the assured sufficient to pay an assessment, it cannot declare a forfeiture of the policy for nonpayment of such assessment.

Appeal from Franklin District Court.—HON. W. D. EVANS,
Judge.

FRIDAY, JANUARY 13, 1905.

SUIT in equity on a policy of fire insurance. There was a judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

Will E. Johnston, for appellant.

J. H. Scales, for appellee.

SHERWIN, C. J.—The appellant is a mutual association incorporated in this State. A. D. Long was its local soliciting agent at Parkersburg, Iowa, and took the plaintiff's written application for insurance therein to the amount of \$400. He was authorized to collect contingent fees on all policies issued by the association, and to retain a certain per cent. thereof. The remainder went to the defendant. The application was for a four-year policy, and the fee that could properly be charged therefor was \$6. Long, however, agreed with the plaintiff that a payment of \$12 should be made when the policy issued, and that no further payment should be demanded during the first year of the policy. There was a notation on the application, when it went to the appellant, that a contingent fee of \$12 had been paid. The appellant made no objection thereto, and when the policy was drawn at the company's home office the same notation was made thereon at first, but it was subsequently erased, and \$6 noted as the contingent fee paid. The \$12 was in fact paid to Long, and \$6 of the amount was actually received by the appellant. The plaintiff suffered a loss about nine months after the policy issued, and, having failed to pay an assessment of \$3 made two months prior thereto, the appellant contends that it is not liable.

That the appellant had notice of the amount paid by the plaintiff to Long cannot be well questioned. In fact, it appears that it received a part of the excess fee paid. By the terms of its contract with Long, he was to receive 60 per cent. of the contingent fees collected, as his commission, the balance of which went to the appellant. Had he collected only the legitimate fee of \$6, the appellant would have received less than \$3 as its share thereof, whereas it in fact received \$6. Long, as its agent, had authority to take the application and deliver the policy, and, to collect the contingent fee authorized by its charter and by-laws. In charging and collecting a contingent fee of \$12, he was acting within the apparent scope

of his authority, at least; but, if this were not so, the appellant knew the amount that was in fact paid, and, by accepting the application and issuing the policy, it ratified Long's act, and cannot now be permitted to say that it was beyond the scope of his power as its agent. *McArthur, Adm'r, v. Ins. Ass'n*, 73 Iowa, 336; *St. P. F. & M. Ins. Co. v. Sharer*, 76 Iowa, 282.

It is contended, however, that the plaintiff was charged with knowledge of the amount of the contingent fee which might lawfully be charged for his policy, and of the provisions of the appellant's charter and by-laws; and this because it was a mutual association, of which he was a member. But there was nothing in his application which gave him any information on the subject. The payment of the fee and the delivery of the policy were contemporaneous acts, and upon the completion of that transaction he became a member of the association, and not before. He was therefore not a member thereof charged with knowledge of its by-laws when the payment was made to Long.

While the plaintiff was bound to pay the assessments provided for by the terms of his policy, there was no inhibition on the advance payment thereof; and we apprehend that the deposit with appellant of a sufficient sum of money to meet future assessments would not be illegal, and that, while the association had sufficient funds in its hands to cover an assessment, no forfeiture of the policy could be declared because of a failure to pay such assessment. The trial court rightly held that the appellant had funds in its hands belonging to the plaintiff, and that it should have applied a part of the same on the assessment of July.

The judgment is therefore *affirmed*.

2. MUTUAL INSURANCE: notice of conditions.

3. NONPAYMENT OF ASSESSMENT: forfeiture of policy.

P. F. DALTON, Appellee, v. THE MILWAUKEE MECHANICS' INSURANCE COMPANY, Appellant.

Fire insurance: REFORMATION OF POLICY. Where a provision in a
1 policy for concurrent insurance has been omitted by oversight,
equity will reform the contract to correspond with the under-
standing of the parties.

Insurance of mortgagee's interest: REFORMATION. A mortgagee in
2 possession of personal property has an insurable interest, and
where it was the understanding that a policy should be written to
cover such interest, but the agent failed to write it in conformity
with the agreement, equity will reform and enforce the contract
as mutually intended. Evidence reviewed and held sufficient to
authorize reformation.

Insurance by mortgagee: FALSE REPRESENTATIONS. A bank official
3 having authority to loan its funds, may take as security a note
and mortgage in his own name, and may insure the property as
mortgagee in possession and collect the same in case of loss;
and his statement in procuring insurance on the mortgaged prop-
erty that he was a mortgagee, even though the funds loaned
belonged to the bank, is not such a false representation of his
interest in the property as to avoid the policy, especially where
the agent at the time of issuing the policy was advised of the
facts.

Proof of loss: FALSE STATEMENT: INTENT. A false statement in
4 proof of loss is not a defense in an action on an insurance policy,
unless it is shown that it was made with intent to deceive and
that prejudice resulted.

Insurance: INTEREST OF MORTGAGEE IN POSSESSION. Where a mort-
5 gagee in possession of a stock of goods insures his interest and
the policy is renewed indicating a continuance of the business,
the company cannot insist that the insured had no interest at the
time of the loss, on the ground that the proceeds of sales equaled
the debt, the owner having agreed with the mortgagee that the
store should be kept a going concern and the net profits applied
on the debt.

*Appeal from Plymouth District Court.—HON. F. R. GAY-
NOR, Judge.*

FRIDAY, JANUARY 13, 1905.

ACTION in equity to reform certain of the provisions of a policy of fire insurance and for judgment for the face amount of such policy. From a decree and judgment in favor of plaintiff, the defendant appeals.— *Affirmed*.

Wright & Stout and *Zink & Roseberry*, for appellant.

Martin & Martin and *McDuffie & Keenan*, for appellee.

BISHOP, J.— The action having been brought in equity, and tried as an equitable action, it is here for trial *de novo*. From the record it appears that Baron Bros. were formerly general merchants doing business at Le Mars, this State. In September, 1899, said firm bought from one Johnson a stock of clothing situate in another building in Le Mars, and thereafter operated both stores. In part payment of the stock said firm gave Johnson a promissory note for the sum of \$5,500, due in one year, with interest at 8 per cent., and to secure the same executed a chattel mortgage covering such clothing stock and any additions that might be made thereto, which mortgage was at once made a matter of record. On the same day the said note and the mortgage securing the same were sold and assigned to the First National Bank of Le Mars. In January, 1901, Baron Bros. made an assignment for the benefit of creditors to one G. A. Sammis, and he accepted the trust and took possession of the property of the firm, including both stocks of goods. It appears that in February following an arrangement was entered into, the active participants being Dalton, Baron Bros., and Sammis, assignee, whereby a sufficient sum of money was to be advanced through Dalton to Sammis to satisfy the claims of the general creditors of Baron Bros., said firm to execute a note for such amount, due on demand, and to secure the same by a chattel mortgage on the general stock of goods. In

accordance with this arrangement, Dalton did pay to Sammis the sum of \$9,500. That the money so used belonged to and was the property of the First National Bank of Le Mars is undoubtedly true. Thereupon both stocks of goods were released from the assignment proceedings, and Baron Bros. resumed possession. The firm at once executed a demand note for the amount named, and by direction of Dalton such was made payable to G. A. Sammis, agent. A mortgage on the general stock to secure said note was also executed, Sammis being named as mortgagee, and this was made a matter of record. Immediately thereafter Sammis, still acting under directions of Dalton, assigned said note and mortgage to Dalton, and delivered the same to him.

Upon retaking possession of the stocks of goods, Baron Bros. procured policies of insurance covering such goods to be written by local recording agents, and these were issued in the name of the firm, "loss, if any, payable to mortgagee as his interest may appear." The insurance companies interested declined to carry risks upon property so situated and incumbered, and ordered the policies canceled. One of the agents who had thus written policies was R. J. Koehler, who wrote the policy here in suit as the agent of the defendant company. Dalton was advised of the situation, and in company with Sammis he at once went to Koehler to see what could be done. In respect of what transpired at the time there is some conflict in the evidence. We think, however, that it fairly appears that Koehler was familiar with the situation. And it certainly appears that he suggested as a solution of the difficulty that Dalton should take possession of the goods under his mortgage, whereupon policies could issue to him direct. Dalton stated that he wanted insurance in the total sum of \$15,000, of which Koehler was requested to write the sum of \$8,000, and this Koehler agreed to do. Dalton at once demanded and was given possession of both stocks of goods, and removed the clothing stock, placing it in the storeroom with the general stock. Upon taking

possession Dalton put Sammis in charge of the goods. This having been done, Koehler, without any further conference or directions, and without any request for further information, and on March 22, 1901, issued policies in the name of Dalton; one of such being the policy in suit for the sum of \$3,000 in the defendant company. By oversight no indorsement was made on such policy respecting concurrent insurance. Koehler delivered the policies to Sammis for Dalton, and received the amount of the premiums.

It does not appear that thereafter any formal steps were taken looking to foreclosure of the mortgages. Sammis continued in the conduct of the business under his employment by Dalton, and made sales in ordinary course at retail. A portion of the proceeds were used to replenish the stock and to pay expenses, and the balance deposited in the bank in the name of Sammis, agent. On March 22, 1902, the policies, including the one in suit, were renewed for another year, and the premiums paid by Sammis. On April 6, 1902, the property was wholly destroyed by fire. It is conceded that the value of the goods on hand at all times exceeded the sum of \$15,000. The proofs of loss made by plaintiff recite that "the property belonged at the time of the fire to P. F. Dalton as mortgagee, and no other person had any interest therein except Baron Bros.' equity therein as mortgagors"; and again, "At the time the insurance was effected, the property described belonged to P. F. Dalton as mortgagee," etc. Other facts material to be considered will be mentioned in connection with the various subjects to which they have relation.

I. The plaintiff seeks to have the policy in suit reformed so as to show consent for concurrent insurance. Counsel for appellant are frank to admit that the evidence warrants the conclusion that it was understood and intended by both Koehler and plaintiff that a provision for concurrent insurance should be inserted in the policy, and that such provision was omitted

1. FIRE INSURANCE: reformation of policy.

by Koehler through oversight. In point of fact Koehler did at the time write policies in other companies for which he was agent concurrent with the policy in suit. Counsel also concede that under the uniform holdings of this court equity will decree reformation in such cases. It is said, however, that the rule thus in force in this State has been repudiated by the Supreme Court of the United States in the somewhat recent case of *Northern, etc., Co. v. Grand View, etc., Co.*, 183 U. S. 306 (22 Sup. Ct. Rep. 133; 46 L. Ed. 213), and we are asked to abandon the rule of our former cases and accept of the doctrine announced in the case cited. This we decline to do. We are satisfied that the enforcement of the rule long since adopted in this State has been the means of effectuating justice in many cases, and we are not reminded that it has worked a hardship unjustly in any. The rule is consonant with the spirit of equity, and, in our view, should be adhered to.

II. It is to be observed that the policy in suit was issued to P. F. Dalton without any words of qualification. In the petition it is alleged that the policy applied for and agreed to be issued was one insuring the property and plaintiff's interest therein as a mortgagee in possession; that the agent failed to insert provisions in the policy to make it correspond with and effectuate the understanding, and in that respect reformation is prayed for. That plaintiff, as a mortgagee in possession of personal property, had an insurable interest therein, is true beyond question. And it is equally clear that, if the understanding between plaintiff and the recording agent of defendant was that a policy was to be issued to cover the mortgage interest of the former, and the agent, in writing the policy failed to make it conform in terms to the agreement, a court of equity has power to reform the contract, and enforce it as it was mutually intended to be made. *Esch v. Insurance Co.*, 78 Iowa, 334; *Blake, etc., Co. v. Insurance*

2. INSURANCE
OF MORTGA-
GEE'S INTER-
EST: ref-
ormation.

Co., 73 Wis. 667 (41 N. W. Rep. 968); *Williams v. Insurance Co.* (C. C.), 24 Fed. Rep. 625.

To the propositions of law thus stated counsel for defendant do not demur. Their contentions are directed wholly to the fact questions involved. It is the argument that no mistake of fact was made; that the mistake, if one there was, had relation to the legal effect of the policy as written, of which effect plaintiff was as free to judge as the defendant. The contentions thus made cannot be sustained. To begin with, and stating our conclusions as to the facts, Koehler was well advised in advance respecting the mortgage relation existing between Dalton and Baron Bros., and well knew that the companies that he represented would not carry insurance on the property taken out in the name of the mortgagors. Dalton went to Koehler, not in the capacity of a client, as counsel seem to think, but as to one representing the defendant and other insurance companies; and his mission was to ascertain upon what terms and in what way the companies would consent to carry policies protecting his interests. Koehler proposed that if Dalton would take possession of the stock, and put a man in charge of his interests, he (Koehler) would issue policies in the name of Dalton. This was agreed to by Dalton and it was left for Koehler to write up and deliver the policies. It is true that it was not said in so many words that the policies were to be issued to P. F. Dalton, mortgagee in possession; but that such was the understanding we can have no doubt. And we may get at such understanding from all the circumstances appearing, including what was said by the parties. Both knew that the interest proposed to be insured was that of a mortgagee in possession, and that such would continue to be the status of matters for an indefinite period, and this is witnessed by the requirement made by Koehler that a representative of Dalton should be kept in possession. Both knew that Dalton would not become owner by virtue of the mere act of taking possession, and that at best a legal fore-

closure could not be accomplished until after the lapse of a considerable length of time. Both were experienced business men — the one a banker, and the other an insurance agent of many years' standing — and neither intended to make a contract the validity of which would be open to debate. Moreover, Dalton had nothing to do with the writing of the policies, and he did not see them until after the fire. He left Koehler, believing that he had arranged to have his mortgage interest protected, and that Koehler would write the contract to accomplish that end. This Koehler must have known, and, as we think, he intended to so write as to effectuate the mutual understanding. Whether his omission was the result of carelessness or arose out of a mistaken notion on his part that the policy as written was sufficient to express the understanding is immaterial. His mistake as to the legal effect of the language selected and employed by him in writing up the contract could not operate to change the essential facts as to the understanding and intention of the parties, or deprive either of them of any right under the contract as actually agreed upon. We conclude that a case of mistake of fact was made out, and that plaintiff was entitled to the relief in the respect granted by the decree.

III. It is a provision of the policy in suit that it shall be void "if the interest of the insured in the property be not truly stated therein, or in case of any fraud or false

8. INSURANCE BY MORTGAGEE: false representations. swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." In an amend-

ment to its answer the defendant charges that the policy of insurance is void, and for that reason should not be reformed or enforced, and this because — first, plaintiff was a mortgagee of the property in name only, and that the mortgage and the note secured thereby at all times belonged to and were the property of the First National Bank of Le Mars; second, plaintiff, in making proof of

loss after the fire, swore falsely, in that therein the statement was made by him under oath that the property belonged to him as mortgagee, and no other person had any interest therein except Baron Bros.' equity as mortgagors, whereas in fact the mortgage and the note secured thereby was the sole property of said bank. Neither contention, as thus made, can be sustained. As to the first, the record does not disclose that any statement was made by plaintiff as to his interest in the property, save that which was orally made to Koehler at the time the issuance of the original policy was arranged for. He then declared truly that his interest was that of a mortgagee. We need not stop to consider what might have been the effect had he been called upon for a more specific statement, and had given answers that were untrue. As to the second, it appears that of the moneys of the First National Bank, Dalton, its president and manager, advanced to Sammis, as assignee, a sufficient sum to enable him to settle with the general creditors of Baron Bros. That this was done pursuant to an arrangement with said firm cannot be doubted, although we are not advised as to the details. As a part of the arrangement it was contemplated that a mortgage should be executed by said firm to secure such advancement, and accordingly Sammis, acting for Dalton, took the note for \$9,500 and the mortgage to secure the same, which he at once thereafter assigned to Dalton. It is contended by counsel for appellant that this note covered not only the money advanced, but the balance due on the Johnson note, held by the bank. It is true that in the reply some language is used indicating such to be the fact. The evidence, however, shows the truth to be otherwise. Now, Dalton took and continued in possession of the goods in his own name, and Sammis, and afterwards one Shaffer, continuously acted as his agents in conducting the business and in accounting to him for the proceeds. It is undoubtedly true that Dalton regarded the bank as having a beneficial interest in the note and mortgage; indeed, he testified that he

was acting in the interests of the bank, and the note and mortgage were deposited in the bank. It does not appear, however, that any formal transfer thereof was ever made by him. This, in substance, was the fact situation under which Dalton verified the proofs of loss. Therefrom this question arises: Was the oath made by Dalton a false one, and, if so, was it so far material in character that a forfeiture of all rights under the policy should be imposed by a court sitting in equity? Going back to the beginning, and to get at the relations between Dalton and the bank, it may be assumed that the former had the right to loan the moneys of the latter. It cannot be assumed that he had the right to loan such moneys and take the securities in his own name. This he did, however, and accordingly we have Dalton with the securities and the bank with nothing to evidence the disposition of its money. We may concede that the bank could have demanded an accounting, or could have required an absolute transfer to it of the securities. It did not do so, and from this but one conclusion can follow: that the bank was willing to look to Dalton for an ultimate accounting, and Dalton was willing to personally assume all responsibility for the amount of the money thus taken and loaned. Even if the meager statement of facts which the record presents would enable us to do so, we should not feel compelled to enter upon a precise definition of the legal relations existing between Dalton and the bank — whether of debtor and creditor, agent and principal, or trustee and *cestui que trust*. It is sufficient to say that in either relation, keeping in mind the fact that he was in possession, he had the right to insure the property in his own name, and, the bank offering no interference, he could collect the proceeds in case of loss. *Carter v. Insurance Co.*, 12 Iowa, 287; *Strong v. Insurance Co.*, 20 Am. Dec. 515; *Riggs v. Insurance Co.*, 125 N. Y. 7 (25 N. E. 1058; 10 L. R. A. 684; 21 Am. St. Rep. 720); *Roberts v. Insurance Co.*, 165 Pa. 55 (30 Atl. Rep. 450;

44 Am. St. Rep. 642); May on Insurance (2d Ed.), section 80; 13 Am. & Eng. Enc. of Law, 177, 217.

It is well settled that a false statement in proofs of loss cannot be made available as a defense in any event unless shown to have been made with intent to deceive, and that prejudice resulted. There was no attempt to make proof in such respects in the instant case. *Miller v. Insurance Co.*, 31 Iowa, 216; *Carey v. Insurance Co.*, 97 Iowa, 619; *Erb v. Insurance Co.*, 98 Iowa, 606; *Huston v. Insurance Co.*, 100 Iowa, 402. Moreover, the defendant knew before the trial of the relations between Dalton and the bank. Had it been apprehensive of any conflict of interest between them by which its rights could be affected in any way, a simple notice to the bank would have required it to come in and assert any rights it might have, or forever after hold its peace.

IV. Next in order we have the contention by appellant that at the time of the fire Dalton had no further interest in the property insured, for that the debt secured by his mortgage had been fully paid. We are not advised as to the precise terms of the mortgage. It may have provided that the lien thereof should attach to goods subsequently acquired, or it may not have so provided. Be the fact as it may, we think it immaterial. It is reasonably certain that the course pursued whereby Sammis, acting for Dalton, used the sale proceeds to pay expenses and to replenish the stock from time to time was known to and acquiesced in by Baron Bros. In the absence of a complaint by creditors or lienholders, we see no reason why the parties in interest might not agree that, instead of strict foreclosure proceedings being resorted to, the store should be maintained as a going concern, the net proceeds to be applied in extinguishment of the mortgage liens. As the defendant company wrote its policy to secure the interest of the mortgagee in possession, and made no requirement as to foreclosure, we are unable to discover

4. PROOF OF LOSS:
false state-
ment; intent.

5. INSURANCE:
interest of
mortgagee in
possession.

any grounds for complaint upon its part. There are several reasons why it ought not to be heard to complain. It wrote the policy for a year, and then renewed it for another year, thus indicating that it expected the store to continue as a going concern. The value of the goods on hand was at all times largely in excess of the insurance carried, and at the time of the fire such value amounted to about \$20,000. There was nothing in the situation or course of proceeding that could in any way increase the hazard or otherwise affect the risk. There is no showing of deceit, fraud, or prejudice.

A word now as to the Johnson mortgage. As we think, such mortgage interest was not covered by the policy in suit. In respect thereof plaintiff was not mortgagee, and it is contended that he had no insurable interest. This seems to have been the thought of counsel for plaintiff also, as in the petition in this action the mortgage to Dalton is alone mentioned as forming the basis of the action. As we have seen, the clothing stock was transferred to the general store, and, in the absence of proof to the contrary, we will assume that the net proceeds from sales thereof were applied in payment of the debt to the bank, as the net proceeds from general stock sales were applied on the Dalton note. At the time of the trial Dalton testified that the balance due on the bank note was \$1,322.45; that on the note held by him the unpaid balance was \$10,989.60. As related to the matters referred to in this paragraph, the cases of *Edwards v. Cottrell*, 43 Iowa, 194, and *Robinson v. Gray*, 90 Iowa, 699, and other like cases, cited by counsel for appellant, have no application. We may concede that in general, where a mortgagee takes possession, and thereafter sells from the mortgaged property, the money or proceeds coming into his hands operates *eo instante* to satisfy *pro tanto* the mortgage debt. But it is otherwise where consent is given, and such is the case with which we have to deal.

V. Other matters of contention presented in argument are sufficiently referred to in the foregoing paragraphs, and

may be regarded as disposed of by what is there said. We are unable to agree with the trial court as to the amount for which plaintiff should have judgment, due, perhaps, to some confusion in the record in respect of the exact total amount of insurance in force at the time of the fire. The case is therefore ordered remanded to the trial court, with instructions to make ascertainment of the amount for which, under this opinion, and in accordance with the facts, plaintiff is entitled to judgment, and correct the decree as may be found necessary. In all other respects the decree is *affirmed*.

F. B. HARRINGTON v. IOWA CENTRAL RAILWAY Co.,
Appellant.

Street obstructions: DAMAGES. Where a railroad embankment obstructs a street affording access to business property which has not been vacated, the owner is entitled to damages for depreciation in the value of his property caused thereby.

Vacation of streets: TITLE. Under Code, section 751, the vacation of a street by a city does not revest the title thereto in the abutting owner, but it remains in the city and may be disposed of for other purposes.

Vacation for railway purposes: DAMAGES. Where a street has been vacated by the city for railway purposes, one whose property has been injured by the construction of the road cannot recover damages of the railway company.

Vacation ordinances: CONSTRUCTION. The provisions of an ordinance intended to vacate portions of certain streets are construed and held sufficient to effect that purpose, although providing that upon abandonment by the company, the title shall revest in the city.

Appeal from Mahaska District Court.—HON. BYRON W. PRESTON, Judge.

FRIDAY, JANUARY 13, 1905.

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| 126 | 388 |
| 1139 | 593 |
| 1141 | 601 |
| 141 | 602 |

ACTION to recover damages to property by reason of the obstruction of a street by the defendant. Verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

George W. Seevers and J. O. Malcolm, for appellant.

Davis & Orris and McCoy & McCoy, for appellee.

MCCLAINE, J.—Plaintiff's premises, used for manufacturing purposes, front on Second avenue, in the city of Oskaaloosa, and are about one hundred and fifty feet distant from Kossuth street, which runs north and south and crosses Second avenue at a right angle. In 1870 the city granted to the Central Railway Company of Iowa the right to lay its tracks over and along Kossuth street and across any streets or alleys intersecting that street, and this right was exercised and enjoyed by that railroad company and the defendant, its successor in interest, by constructing and maintaining a track along Kossuth street as far south as the intersection of Second avenue, until 1897, when by ordinance Kossuth street, and the portion of Second avenue intersecting it, and portions of other streets were vacated to the defendant, with the provision that when defendant should cease using the streets vacated for railroad purposes all right and title thereto should again become vested in the city, as before the passage of the ordinance. Thereupon defendant erected an embankment at the intersection of Kossuth street and Second avenue, which, as plaintiff claims, has diminished the value of her premises by cutting off access thereto from the direction of Kossuth street along Second avenue. No doubt, if Kossuth street and the portion of Second avenue intersecting it had not been vacated, plaintiff, showing special damage by reason of the obstruction of a street affording access to her property used for business purposes, would have the right to recover as damages the depreciation in the value of her property due

1. STREET OB-
STRUCTIONS:
damages.

to the obstruction of the street, if such obstruction was shown. *Park v. C. & S. W. R. Co.*, 43 Iowa, 436; *Dairy v. Iowa Central R. Co.*, 113 Iowa, 716.

But the city had the right to vacate the portions of the streets referred to (see Code, section 751), and on such vacation the title to the portions of land formerly occupied by the streets did not revert in the abutting owners, but remained in the city, and such portions could be disposed of for other purposes.

Marshalltown v. Forney, 61 Iowa, 578; *Williams v. Carey*, 73 Iowa, 194; *Burlington Gas Light Co. v. Burlington C. R. & N. R. Co.*, 91 Iowa, 470; *McLachlan v. Town of Gray*, 105 Iowa, 259; *Lake City v. Fulkerson*, 122 Iowa, 569; *Barr v. Oskaloosa*, 45 Iowa, 275; Code, section 883.

We need not discuss the validity of the ordinance vacating the portions of the streets, for no question of that kind is raised. Plaintiff could, no doubt, have had the

action of the city in vacating Kossuth street, and thereby cutting off access to her premises along Second avenue from that direction, reviewed in a proper proceeding, and could have had relief as against the city if it was improper; but she cannot recover against the defendant for the use of the street after its vacation in such way as to merely obstruct travel thereon. *Barr v. Oskaloosa*, 45 Iowa, 275. That a vacated street may be appropriated by the city to railroad or other purposes inconsistent with its further use for public travel has been settled beyond controversy. *Marshalltown v. Forney*, 61 Iowa, 578; *Spitzer v. Runyan*, 113 Iowa, 619.

The real contention of counsel for plaintiff seems to be that the ordinance passed in 1897 did not purport to vacate the street, but only to give the defendant the right to use the street for railway purposes; but the language of the title and body of the ordinance is susceptible of no other construction than that the portions of streets referred to therein were vacated and

2. VACATION OF
STREETS: title.

3. VACATION FOR
RAILWAY PURPOSES.

4. VACATING ORDINANCES:
construction.

given to the defendant for its exclusive use. It seems to us immaterial for present purposes that the fact of vacation and the purposes to which the vacated portions of streets are appropriated is expressed in one sentence. The language of the enacting clause of the ordinance is that the portions of the streets described "are hereby vacated to the Iowa Central Railway Company," and the purpose and effect of the ordinance is not otherwise stated or explained. The proviso that the title to the portions of streets vacated shall again become vested in the city when the railway company shall cease to use them for railroad purposes is merely a condition subsequent, and has no bearing in explaining the present purpose and effect of the ordinance. That which would have been an improper use of the portions of the streets in question had they never been vacated for public use, and would have constituted a nuisance for which plaintiff might recover damages, cannot be the basis of a cause of action against the defendant in view of the fact that such portions of streets are no longer subject to use as parts of public highways.

As we reach the conclusion that plaintiff has made out no cause of action against the defendant, it is unnecessary to discuss the errors relied upon in instructions to the jury as to measure of damages.

The judgment of the trial court is *reversed*.

GRACE HOON, Appellant, v. RUSH HOON, Appellee.

Statute of frauds: EXPRESS TRUST. An express trust arising from
 1 placing the title to real property in a son for the benefit of the father can only be established by documentary evidence.

Advancements: TRUSTS: PLEADINGS. As between parent and child
 2 a conveyance of real property is presumed to be an advancement; but this presumption may be overcome by clear and satisfactory proof showing a trust; but to admit proof of a trust the facts relied upon must be pleaded.

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| 126 | 391 |
| 136 | 699 |
| 126 | 391 |
| 139 | 57 |
| 139 | 161 |

Fraud: PLEADINGS. Fraud cannot be pleaded in general terms, but
3 the facts relied upon must be stated.

Appeal from Cedar District Court.—HON. W. G. THOMPSON, Judge.

SATURDAY, JANUARY 14, 1905.

ACTION in equity to declare a trust in favor of plaintiff in certain real estate. Demurrer to petition sustained, and plaintiff appeals.—*Affirmed.*

Wright, Leech & Wright, for appellant.

France & Rowell, for appellee.

WEAVER, J.—The petitioner states that her father, Silas Hoon, died, leaving a will, by which his property and estate were to be divided equally between herself and her brother, the defendant. She further states that at the time of his death the said testator had no property or estate except a certain lot in Tipton of the value of \$1,000. This property, she says, was purchased with the proceeds of other property formerly owned by her father, and that in taking the conveyance thereof the deed was made to the defendant, Rush Hoon. It is further averred that the deed, though absolute in form, was in fact held by defendant in trust for the benefit of her said father, and was so recognized in his lifetime. By a separate paragraph of the petition it is further alleged that the "deed is a fraud, and was procured fraudulently, without the knowledge of Silas Hoon, who supposed up to the time of his death that the record title was in himself."

The ruling of the trial court is sustainable on several grounds.

I. Taking the petition as a whole, it seems to predicate plaintiff's action upon an express trust, pursuant to which

Rush Hoon took and held the title to the lot in controversy for the use and benefit of his father. The trust, if one ever existed, is not shown by the deed to the alleged trustee, nor by any other instrument in writing, and, in the absence of such documentary evidence, an express trust cannot be established. Code, section 2918.

II. There is no allegation of facts which would create a resulting trust in favor of Silas Hoon. It may be admitted that the "money of Silas Hoon paid for the property," but that fact does not of itself indicate the existence of such a trust; and this is especially true when we note that the grantee named in the deed is the child of the Silas Hoon whose money is alleged to have paid for the lot. As between parent and child, such a conveyance is presumed to be a gift or advancement. *McClin-tock v. Loisseau*, 31 W. Va. 865 (2 L. R. A. 816), and cases cited in note thereto; *Andrews v. Oxley*, 38 Iowa, 578; *McGinnis v. Edgell*, 39 Iowa, 419.

This presumption is not conclusive, *Cotton v. Wood*, 25 Iowa, 43, and may be overcome by clear and satisfactory proof; but to permit the introduction of such proof the party asserting the trust must plead something more than the fact that the parent's money paid for the land while the deed was made to the child. In other words, he must allege the facts on which he relies to overcome the presumption to which the matters just stated give rise.

III. Neither is there any allegation of fraud from which the law will raise a constructive trust. The statement that the deed was "fraudulently executed, and in fraud of the said Silas Hoon," and that the "deed is a fraud, and was procured fraudulently," contains no allegation of issuable fact. It is not sufficient to plead fraud in general terms, and, if the pleading does not state the specific acts or facts relied upon as constituting fraud, a demurrer thereto will be sustained. *Mills v. Collins*, 67 Iowa, 164; *Encyclopædia Pleading and Practice*,

1. STATUTE OF
FRAUDS: ex-
press trust.

2. ADVANCE-
MENTS:
trusts;
pleadings.

3. FRAUD: plead-
ings.

volume 9, 697. In this respect the plaintiff's petition is plainly deficient.

The question of the effect of the statute of limitations is also discussed by counsel, but the conclusion we have reached upon other questions raised by the appeal makes it unnecessary for us to consider it.

The demurrer was correctly sustained, and the judgment appealed from is *affirmed*.

FRANK BERKEY, Plaintiff, v. W. G. THOMPSON, JUDGE, DEFENDANT, and E. LEFEBURE AND SONS, Appellants.

Re-taxation of costs: JURISDICTION OF LOWER COURT. The right to
1 recover costs is to be determined by the judgment, and during
the pendency of an appeal the district court has no jurisdiction to
modify or correct the same, and generally has no authority in an
equity action to pass upon a motion to re-tax after an appeal
has been taken.

Same. The district court has no jurisdiction to tax the costs of
2 printing an appeal or the fees of the clerk of the supreme court.

Taxation of costs: EXPENSE OF TRANSCRIPT. The expense of pre-
3 paring a translation of the shorthand reporter's notes for use on
appeal should ordinarily be taxed by the appellate court; and so
long as the case is pending on appeal the district court has no
jurisdiction to tax any costs which may be taxed in the supreme
court.

Certiorari: TAXATION OF COSTS. Where the trial court is without ju-
4 risdiction or acts illegally in the taxation of costs, its rulings may
be reviewed on *certiorari*.

SATURDAY, JANUARY 14, 1905.

ORIGINAL proceedings by certiorari to review the action
of the defendant judge in taxing the costs of a translation of
the short-hand reporter's notes for an appeal to the plaintiff.
— *Annulled*.

Read & Read, for plaintiff.

Voris & Haas and *C. T. Jones*, for defendants.

DEEMER, J.— This proceeding grew out of the case of *Berkey v. Lefebure*, 125 Iowa, 76. An opinion was filed in that case affirming the judgment of the court below in favor of plaintiff, Berkey, save as to a modification of the amount of recovery to the extent of \$51. Pursuant to the opinion rendered, the clerk of this court taxed all the costs to the plaintiff. Thereupon, and upon June 13, 1904, plaintiff filed a motion to retax all costs in this court to the defendants and appellants. That motion was sustained. On June 7, 1904, plaintiff gave notice of intention to file a petition for rehearing, and this was followed in due season by a petition. After the ruling on the motion to retax costs was made, a *procedendo* was inadvertently issued to the district court, which was filed therein June 14th. This should not have been done, on account of the pendency of the petition for a rehearing. On June 15, 1904, defendants in the main suit filed a motion in the district court asking that the costs of the transcript of the shorthand reporter's notes and certain other items of cost be taxed to the plaintiff. To this plaintiff appeared, and filed a resistance, and affirmatively asked the taxation of certain costs in his favor. In this resistance plaintiff challenged the jurisdiction of the district court to make any order with reference to the costs of the shorthand reporter's transcript, and pleaded the ruling of this court in passing upon the motion to retax as a bar. After hearing the motion to retax, the trial court made an order taxing the costs of the translation of the notes to plaintiff, and sustained the other division of the motion to retax in part only. A writ of *certiorari* was issued from this court to review the action of the district court in taxing the costs of the translation of the shorthand reporter's notes to the plaintiff.

Conceding *arguendo* that, notwithstanding an appeal to this court which does not question the general order for the payment of costs, the district court has jurisdiction to entertain a simple motion to retax, which involves nothing but a mistake of the clerk, due to omission or miscalculation, yet the right to recover costs is determined by the judgment, and so long as the appeal is pending the district court has no jurisdiction to modify or correct the same; nor, as a general rule, has the district court any jurisdiction or authority in an equity case, after an appeal to this court, to pass upon a motion to retax. *Levi v. Karrick*, 15 Iowa, 444.

But there are certain items of cost over which the district court has no jurisdiction. It cannot in any manner control costs to be taxed in this court. It has

1. RETAXATION OF COSTS: jurisdiction of lower court.

2. SAME. no jurisdiction over the costs of printing, or of the fees of the clerk of this court. To so hold would result in an unseemly conflict of authority, which must at all times be avoided.

Defendants concede in their motion that a translation of the shorthand reporter's notes was necessary to the presentation of their appeal, and that it was not needed for any other purpose. After the same was prepared, and used upon the appeal, and the case had been determined, this court adjudged that all costs of the appeal should be paid by the defendants, notwithstanding the slight modification of the judgment in their favor. True, the expense of the translation was not among the items taxed by the clerk of this court, but there is no authority for taxing it in the district court under such a state of facts as here appear. Code, sections 3875, 4142. Defendants were notified of plaintiff's motion in this court to retax, and were advised of the ruling thereon. Indeed, the certificate of the clerk of this court which was returned to the district court showed that the costs were, upon motion to retax, taxed to the defendants. That the expense of procuring a translation

3. TAXATION OF COSTS: expense of transcript.

of the shorthand reporter's notes should ordinarily be taxed in this court, is directly decided in *Palmer v. Palmer*, 97 Iowa, 454. See, also, section 104 of the rules of practice of this court. At any rate, so long as the cause is pending in this court, as this one was, in virtue of the notice of and the petition for a rehearing, the district court had no jurisdiction over costs which might be taxed here. Code, sections 3875, 4142, and rule 104, *supra*. Moreover, this court had already determined that all costs of the appeal, which, of course, included all costs that might properly be taxed here, should be paid by defendants, and, if the rule contended for by them should gain a foothold, we would lose all control over the taxation of costs in this court, and parties might relitigate that issue after appeal and order here. This, of course, cannot be correct practice.

But it is said that, as the district court had jurisdiction to act on part of the motion, its ruling on the item now in controversy cannot be selected out and made ground for the issuance of a writ of *certiorari*; that appeal is the only proper remedy. An examination of the record discloses that defendants' motion in

4. CERTIORARI:
taxation of
costs.

the district court was in two parts—one to tax the costs of the translation of the shorthand reporter's notes, to which the objections noted were filed; and the other to retax certain items. The two parts were separate and distinct, were bottomed on distinct and different grounds, and were, in effect, separate motions. Of one we may assume the district court had jurisdiction, but of the other it manifestly did not have. No complaint is made of the ruling on that part of the motion to retax, and we have no occasion to consider its correctness. The part wherein the court was asked to tax costs was not within the jurisdiction of the trial court. Of course, the question of jurisdiction may in many cases be raised by appeal, but such remedy is not exclusive. If the trial court has no jurisdiction, or it has acted illegally,

its rulings may be corrected on *certiorari*. *Porter v. Butterfield*, 116 Iowa, 725.

Assuming, however, for the purposes of the case, that the trial court had jurisdiction of the motion because part of it was proper to be considered, yet in overruling the action of this court in the matter of taxing the costs of the transcript it acted illegally, and its ruling thereon may be reviewed by *certiorari*. One may not select one merely erroneous ruling out of many, and have it reviewed by this court on *certiorari*, especially where there is a plain, speedy, and adequate remedy by appeal; but where the motion embraces distinct parts, upon some of which the district court has no jurisdiction, or upon which it acts illegally, there is no reason why such rulings may not be reviewed. *O'Hare v. Hempstead*, 21 Iowa, 33, does not announce a contrary doctrine. Here there is no dispute as to the facts, no conflict of evidence to review, nothing but a question as to the power and authority of the court to act in the premises. Such ruling may be reviewed by *certiorari*. *Edgar v. Greer*, 14 Iowa, 211; *Clary v. Hoagland*, 5 Cal. 476. The trial court had no authority to order the expense of the translation of the shorthand reporter's notes taxed to the plaintiff, as it was without jurisdiction over this part of the motion. Its order with respect thereto is therefore annulled and set aside.—*Annulled*.

C. L. SCHIELE V. G. F. THEDE, Appellant.

Justices of the peace: JURISDICTION. After a justice of the peace

- 1 has made an order finally disposing of a case pending before him he loses jurisdiction, and the parties are not required to take notice of further orders entered by him without the service of a new notice as provided by law restoring his jurisdiction.

Void judgment: INJUNCTION. Where a justice erroneously trans-

- 2 fers a cause to the district court, and after the lapse of fourteen days assumes to further proceed with the case without the service

of legal notice, a judgment subsequently entered by him is void for want of jurisdiction, and its enforcement may be enjoined without a showing of merits.

Appeal from Cedar District Court.—HON. B. H. MILLER,
Judge.

SATURDAY, JANUARY 14, 1905.

ACTION to enjoin the levy of an execution issued out of the office of the clerk of the district court on a judgment of a justice of the peace in favor of defendant against plaintiff, a transcript of which has been filed in the office of said clerk. The case was tried on an agreed statement of facts, and a decree rendered for plaintiff, from which defendant appeals.—*Affirmed.*

E. M. Warner and F. J. Casterline, for appellant.

Wright, Leech & Wright, for appellee.

MCCLAINE, J.—The justice of the peace rendering the judgment acquired jurisdiction of the case by change of venue from another justice, and when the case was reached for trial defendant not only denied the plaintiff's cause of action, which was for \$100, and therefore within the justice's jurisdiction, but also interposed a counterclaim for \$268, an amount in excess of the justice's jurisdiction. Thereupon the defendant in that case moved the justice to transmit the cause to the district court on the ground that the amount in controversy, after the filing of the counterclaim, exceeded the jurisdiction of the justice, and precluded him from proceeding further. The justice sustained this motion, and made a proper entry of his action on his docket. Fourteen days afterward, the justice, on his own motion, made another entry in his docket, reciting that upon further consideration and investigation he found there was no statutory authority

for transmitting the case to the district court except on appeal, and set aside his former entry, and entered an order overruling the motion for transfer; further reciting that defendant's counterclaim, to the extent of \$100, would be considered, and all in excess of that stricken out. The entry further recites that the cause is set for trial three days later, and notice thereof mailed to defendant's attorneys. It appears from the agreed statement that the justice on the date of the last entry did send to the attorneys for the defendant in the case a letter advising them of this ruling and of the day set for the hearing, and, further, that on the day thus set the cause would be further adjourned for three days, and that on the date thus to be fixed in the second adjournment the cause would be heard. It further appears that on the date of the entry of reinstatement of the cause the justice in person notified the adult son of defendant, at the defendant's home, of his action, with the request that the information be communicated to the defendant, which was done. On the date to which the cause was first adjourned in this order of reinstatement another entry was made on the docket that it was adjourned for three days further, and on the date fixed in this last adjournment, which was the date indicated in the letter to defendant's attorneys, a hearing was had, and, defendant not appearing, judgment was thereupon rendered for plaintiff for \$100 and costs. This is the judgment recorded by transcript in the clerk's office on which the execution involved in this case has issued.

With reference to the jurisdiction of the justice to further proceed in the case, it is wholly immaterial whether or not the entry of the order transferring the case to the district court was erroneous. The justice thereby did make a final disposition of the proceedings pending before him, and the defendant was not called upon to take further notice of any orders entered by the justice without a new notice restoring the jurisdiction of the justice being served upon him. After the apparent

1. JUSTICES OF
THE PEACE:
jurisdiction.

conclusion of the case the defendant was not bound to anticipate or inform himself as to any subsequent proceedings, unless they were in some way authorized, and might have, therefore, been anticipated in view of the statutory provisions as to practice in the justices' courts; nor would actual information to him or his attorneys of the proposed unauthorized action of the justice make it incumbent upon him to appear in further proceedings. We have so held as to proceedings in a court of record. *Perry v. Kaspar*, 113 Iowa, 268.

The reasoning applies with even greater force to the decisions of a justice of the peace, who has limited, and not general, jurisdiction. Therefore, in the absence of any legal notice requiring the defendant to further appear, the proceedings of the justice in reinstating the action, setting a time for hearing, and rendering judgment by default were wholly unauthorized. The statutory provisions as to proceedings in justices' courts contemplate a prompt disposal of causes pending therein. The justice is not authorized to adjourn the proceedings for a period of more than three days, nor to make more than two such adjournments; the only exception recognized being an adjournment for not exceeding sixty days on the application of either party, based on a showing as to absence of witnesses. Code, sections 4496, 4497. It is true that we held in the case of *City of Cedar Rapids v. Rall*, 115 Iowa, 335, that the jurisdiction of the justice was not lost by mutual consent of the parties to an indefinite continuance, and that thereafter the justice might, on full and fair notice to the parties, proceed to try the case; but the rule was there recognized that an adjournment for more than three days without the consent of a party deprived the court of jurisdiction. It is evident that it was not the intention of the Legislature, in enacting the sections relating to practice in the justices' courts, nor of this court in construing these sections, that a case should be hung up indefinitely in a justice's court without the consent of a party, and reinstated at the justice's

2. Void judgment: injunction; merits.

option. The defendant before the justice of the peace (plaintiff in this action) had the right to know whether he was in court or not, and when an order was made which terminated the justice's jurisdiction (whether rightful or wrongful is immaterial) he had the right to ignore further proceedings, save as they were authorized by law.

As the judgment, on which the execution sought to be enjoined was based, was rendered without any jurisdiction whatever on the part of the justice, it was not necessary for plaintiff to show a meritorious defense in his action to restrain its enforcement. *Rowley v. Baugh*, 33 Iowa, 201.

The judgment of the lower court is *affirmed*.

JANE BARBER V. BERNETTA MADEN, Appellant.

Settlement: BURDEN OF PROOF. The burden of proof on an issue of
1 settlement pleaded in defense to an action for services, is on the defendant.

New trial. It is not error to deny a new trial on the ground of newly
2 discovered evidence, where the witness was present and testified at the trial and his statement in the affidavit relied upon in support of the motion is denied.

Reduction of verdict. It is error for a trial court to reduce a ver-
3 dict and enter judgment without giving the party against whom it is to be entered the option of accepting the same or submitting to a new trial.

Appeal from Tama District Court.—HON. G. W. BURNHAM, Judge.

SATURDAY, JANUARY 14, 1905.

SUIT to recover for services rendered the defendant. Trial to a jury, and a verdict for the plaintiff, which was reduced by the court, and judgment entered thereon. Both parties appeal. The appeals were separately docketed, but

it is one case, and they will both be disposed of in this opinion; the defendant being designated the appellant.—*Reversed.*

Caldwell & Walters, for appellant.

Struble & Stiger, for appellee.

SHERWIN, C. J.—The plaintiff sued to recover the reasonable value of her services for nursing and caring for the defendant during a period of nearly two years. The plaintiff furnished the defendant board and a room during this time, and also gave her such personal attention as was required by her condition. There was an agreement between them that the defendant should pay \$2.50 per week, the plaintiff claiming that such sum was for board and room alone, and that she was to receive additional compensation for her care and nursing; and the defendant claiming that the sum named was to be in full for board, room, and attention. The sum agreed on was paid before the commencement of this suit, and no question relative thereto is involved herein, except incidentally. The appellant's most strenuous contention is that there should have been a directed verdict for her. But we cannot assent to this proposition. Aside from the fact that the parties made several settlements during the time, the evidence was quite evenly balanced on this question; and, while a settlement will be presumed to cover all past transactions, the presumption is not conclusive, and the plaintiff's explanation thereof warranted the jury in finding as it did.

The court properly instructed that the burden was on the defendant to prove the settlement pleaded. The existence of the presumption to which we have referred did not change the burden of proof from the defendant to the plaintiff. It remained where it was originally, and was only aided by the inconclusive pre-

1. SETTLEMENT:
burden of
proof.

sumption. The plaintiff did not admit a settlement of the claim sued on. Had she done so there would have been an end of the case at once, and all through the trial the burden of proving that such claim had been settled was on the defendant. Strictly speaking, the burden of proof never changes from one party to another during the trial. The amount of proof necessary to maintain an issue may be lessened by presumptions or by other matters, but the burden rests on the same party all of the time.

There was no abuse of discretion in refusing the appellant a new trial on the ground of newly discovered evidence.

Dr. Allen was present during the trial, and a witness in the case. The statement in his affidavit relied upon by the appellant is flatly contradicted by the plaintiff.

Because the trial court concluded that the verdict was too large does not necessarily prove that it is contrary to law. It frequently happens that a trial court finds verdicts too large to meet its approval, and requires the party to remit or submit to a new trial, and this course has been often approved when it appeared that the verdict was otherwise right. The verdict was for \$462.50. This the court reduced to \$300, and rendered judgment therefor without giving the plaintiff an option to accept that amount or submit to a new trial. This was error. The plaintiff was entitled to the finding of a jury as to the amount due her, and until she waived that right the court had no power to determine the question or to change the verdict to her prejudice. *Brown v. McLeish*, 71 Iowa, 381; *Hudson v. Applegate*, 87 Iowa, 605. For this error the judgment must be reversed on the plaintiff's appeal. We shall not, however, render a judgment on the verdict, but shall remand the case to the district court, with instructions to either render a judgment on the verdict returned, or permit the plaintiff to elect whether she will take a judgment for \$300 or a new trial.

2. NEW TRIAL.

3. REDUCTION OF VERDICT.

On the plaintiff's appeal the case is reversed and remanded, and on the defendant's appeal it is *affirmed*.

R. C. NOCKS, Appellee, v. THE INCORPORATED TOWN OF WHITING, Appellant.

Defective streets: INJURY TO AN ANIMAL AT LARGE: LIABILITY OF TOWN. A town is liable for the injury to a horse though running at large, caused by a defective street negligently permitted to remain out of repair.

Appeal from Monona District Court.—HON. G. W. WAKEFIELD, Judge.

SATURDAY, JANUARY 14, 1905.

ACTION to recover damages for an accidental injury to a horse owned by plaintiff, the same having been occasioned, as alleged, by a defect in a street of the defendant town. From a verdict and judgment in favor of plaintiff, the defendant appeals.—*Affirmed*.

C. E. Underhill and A. M. Bowen, for appellant.

H. A. Evans and S. D. Crary, for appellee.

BISHOP, J.—The facts shown by the record, and taken most favorably to plaintiff, as we are authorized to do, make it appear that on the day in question a young horse owned by plaintiff, and kept usually in his stable abutting upon a public alley in the defendant town, managed to slip its halter and escape from the barn into the alley, and from thence into the street; that it ran up the street, being one of the main public streets in the town, and in doing so it stepped into a hole in the surface thereof, resulting in the accident

and injury complained of. The street was eighty feet in width, and, as testified to by some of the witnesses, the hole was eight or ten feet distant from the center of the street; that it was from six to eight inches in diameter, and from eighteen to twenty-four inches in depth; that it had been made there by the removal, several months before, of a post used to support a merry-go-round, which had been there operated by permission of the town authorities.

The court overruled a motion to instruct a verdict in favor of defendant, and submitted the case to the jury upon the theory that if negligence on the part of the defendant in respect of the condition and care of its street had been made to appear, and, further, that the plaintiff was not negligent in allowing his horse to escape from the barn and into the street, and that an injury occurred as alleged, the right on the part of the plaintiff to recover damages should be regarded as established. The correctness of the position thus assumed is challenged by the appellant, and this raises the only question necessary to be determined by us in disposing of the case.

That cities and towns are required to keep all streets and public places within their limits, and which are open for public use, free from dangerous obstructions and pitfalls, and in a condition of reasonable repair, is the unquestioned rule of law in this State. And the requirement is broad enough to cover not only the purposes of public travel, but any use to which the street may be subjected not in itself violative of any established rule of law, and hence improper and illegal. In other words, the duty of the city or town does not end when it has prepared a way over which those engaged in actual travel may pass with convenience and reasonable safety. Having control of the streets and public places, and such having been thrown open to the public use, it owes the further duty to protect users lawfully entering thereon from dangerous defects which in reason should not have been allowed to exist. The principle involved is that which ap-

plies to the case of an owner of private grounds who throws the same open to and invites a public use thereof. He may not create a dangerous condition therein, or knowingly continue a created danger, not obvious in its character, and escape liability for injuries resulting therefrom. *Haughey v. Hart*, 62 Iowa, 96; *Young v. Harvey*, 16 Ind. 314; *Hurd v. Lacy*, 93 Ala. 427 (9 South. Rep. 378, 30 Am. St. Rep. 61).

It is to be observed that in the instant case it is not made to appear that the herd law, forbidding animals to run at large, was in force in Monona county, nor does it appear that there was any ordinance of the defendant town on the subject. We have, then, the question whether an accident and injury to a horse, not a trespasser, but which has escaped momentarily from the control of its owner, and which accident occurs while the animal is running over and upon a public street, comes within the operation of the rule above referred to. There being no contributory negligence on the part of the owner, and assuming that the accident was one that might have occurred irrespective of the immediate control of the animal, we see no reason why the rule should not be given application and a recovery allowed. This conclusion, as we think, is expressly authorized by the holding in the case of *Manderschid v. Dubuque*, 25 Iowa, 108. In that case it appeared that a horse while being driven escaped from the control of its master, and ran away. While crossing a bridge it stepped into a hole negligently permitted in the floor thereof and was injured. The bridge was part of a public street in the defendant city, and a recovery was sustained. There can be no difference in principle between a case where a horse has momentarily escaped from its driver and the case of one momentarily escaping from the barn or inclosure of its owner. Counsel for appellant seem to think that the case of *Moss v. Burlington*, 60 Iowa, 438, is an authority to the contrary. We do not so regard it. In that case it appeared that a horse fastened to a post in the

street became frightened, broke the fastening, and ran away. At the end of the street there was a very steep declivity, and the horse went over this and was killed in the fall. It was said there could be no recovery, and this holding seems to have been put upon the ground that the declivity was an impassable one, and that "if the horse had been driven over the declivity by his owner no recovery could be had for the damages sustained." It is not improbable that a distinction between the duty of a city to improve its streets and the duty to keep them in repair entered into the consideration of the court, but it is not so stated in the opinion. The Manderschild Case is cited, and the doctrine there announced is not questioned. While the reasoning of the opinion in the Moss case is not in all respects satisfactory, we think that on the whole the construction placed upon it by counsel is not warranted.

The questions having reference to the character of the defect complained of, and of the knowledge of the town authorities thereof, and of the exercise of due care on the part of plaintiff, were all properly submitted to the jury.

We conclude that no error entered into the judgment, and it is *affirmed*.

HANNAH KING RICHARDSON V. WILLIAM R. BAIRD, ET AL.,
EXECUTORS OF THE WILL OF WM. P. ALLEN, DECEASED,
Appellants.

Wills: OBLITERATION IN PART: EFFECT. Where a provision in a will directing the executors to set aside a specific sum for a certain beneficiary has been partly obliterated, but is still legible, and is followed by a clause evidently relating to the same bequest which has been so obliterated as to be illegible, effect will be given to the legible provision without regard to the erased words.

Appeal from Dubuque District Court.—HON. M. C.
MATHEWS, Judge.

MONDAY, JANUARY 16, 1905.

SUIT to recover a legacy given to the plaintiff by the will of William P. Allen, deceased. The will was executed on the 27th day of July, 1892, at which time the plaintiff, whose maiden name was Hannah King, was about fourteen years of age, and the protégé of the testator. Mr. Allen died in March, 1898, and his will was duly probated in April following. In the second clause of the will, after directions to the trustees named therein, which are not material here, the testator continued: "The trustees will dispose of my personal effects to the best advantage, * * * and I hereby direct them to set aside \$500 for the benefit of Miss Hannah King, if living." All of the words quoted above following the word "advantage" were partially obliterated by a pen and ink, and immediately following the word "living" were two lines of writing evidently relating to the same bequest, which were so completely obliterated as to be illegible. There was a judgment for the plaintiff, from which the defendants appeal.—*Affirmed.*

W. A. Leathers and J. B. Powers, for appellants.

No appearance for appellees.

SHERWIN, C. J.—There is no contention that the obliteration under consideration was made before the will was executed, and the real question in controversy is one of fact. If the obliteration was made by the testator, there can be no question as to his intent in making it. But his intent is wholly immaterial in this investigation, because section 3276 of the Code provides that wills can only be revoked by being canceled or destroyed or by the execution of subsequent wills, and that a revocation by cancellation must be witnessed in the same manner as the making of a new will. There was

no statutory revocation of the will or of the bequest to the plaintiff by cancellation, nor was there a destruction of the parts thereof which were legible when the will was offered for probate. But that part of the clause which was completely obliterated was destroyed, and the will remains as if it had never been written. *Gay v. Gay*, 60 Iowa, 415. The bequest to the plaintiff is fairly legible in the will itself, and the weight of the testimony supports thus far the conclusion of the trial court. Beyond this, however, the testimony is in conflict, the appellants contending that the subsequent language of the clause is legible, and that the bequest to the plaintiff was conditioned thereby on her remaining or being unmarried at the time of the testator's death. As we have heretofore said, all of the legible words in the clause must be considered, and, of course, the intent of the testator must govern. But the trouble here is that the original writing on which the appellants depend is so completely obliterated that it is impossible to decipher it with any degree of certainty. We must therefore give effect to the writing which is legible without regard to the entirely obliterated part of the clause.

The judgment is *affirmed*.

REDHEAD BROTHERS, Appellees, v. THE WYOMING CATTLE
INVESTMENT COMPANY, Appellants.

Sales: BREACH OF CONTRACT: ELECTION OF REMEDIES. Where the ven-

- 1 dor of personal property, after tender and refusal, brought action to recover the contract price, he was not barred on the ground of election of remedies from thereafter amending and asking a recovery of damages for breach of the contract.

Tender: DAMAGES: INSTRUCTIONS. Where plaintiff, under a contract

- 2 to sell defendant a certain number of registered cattle, tendered a lot that were unregistered and therefore refused, and subsequently tendered another lot which were registered but not accepted, whereupon plaintiff brought his action for damages and his testi-

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| 126 | 410 |
| 128 | 75 |

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| 126 | 410 |
| 131 | 87 |
| 131 | 253 |

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| 126 | 410 |
| 137 | 238 |

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| 126 | 410 |
| 1144 | 191 |
| 1144 | 614 |

mony as to damage was confined to the registered animals, an instruction permitting the jury to base its finding upon the first tender of which there was no evidence as to damage, was error.

Sales: DUTY OF VENDOR. Where the seller of cattle knew that the 3 purchaser intended them for breeding purposes, he was bound to deliver only such as were suitable for the purpose.

Sales: COMPLIANCE WITH CONTRACT: EVIDENCE. Under a contract to 4 sell thoroughbred bulls suitable for service, it is competent to show that the tender of a calf of five months was not a compliance.

Sales: COMPLIANCE WITH CONTRACT. The fact that an animal is 5 valuable will not obviate the objection that it is not in compliance with the contract of sale.

Sales: DAMAGES: MARKET VALUE. Where the vendor of cattle for 6 breeding purposes, after tender and refusal, elects to retain the same and claims as damages the difference between the contract price and the market value at the time and place of delivery named in the contract, the value of the cattle for beef was not the proper measure of damages, although their delivery was fixed at a time when there was little sale for breeding purposes, but the jury should have been permitted to consider the fact that the season would soon reopen and to look to sales of similar property within a reasonable time of the delivery together with the cost of keeping the animals, in determining their market value.

Market value: EVIDENCE. In an action to recover the market value 7 of cattle sold for breeding purposes which were tendered under the contract and refused, the defendant should be permitted to show the price at which plaintiff sold the same within a short time of the tender, as bearing on the question of their market value.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

MONDAY, JANUARY 16, 1905.

THE opinion states the facts necessary to an understanding of the case.—*Reversed.*

Read & Read, for appellant.

Carr, Hewitt, Parker & Wright, for appellees.

WEAVER, J.—The plaintiffs bring this action at law to recover judgment against defendant corporation, stating its claim or cause of action in two counts. The first count alleges the sale by plaintiffs to defendant of twenty Hereford bulls, upon terms stated in a written contract, reading as follows:

Des Moines, Iowa, Sept. 24, 1900. This Agreement Witnesseth: That Redhead Bros., of Des Moines, Ia., have this day sold to The Wyoming Cattle and Investment Company, of Des Moines, Ia., for shipment to their ranch twelve miles east of Cheyenne, Wyoming, twenty selected thoroughbred Hereford bulls, to be picked out by Geo. S. Redhead. In consideration of the above sale The Wyoming Cattle and Investment Company will pay to said Redhead Bros. twenty-six hundred dollars, (\$2600.00) and the delivery of twelve (12) shares of paid up non-assessable stock in The Wyoming Cattle and Investment Company. Cattle will be delivered on the cars at Des Moines or other convenient point, on or before July 1, 1901, when payment shall be made. Redhead Bros., By Geo. S. Redhead.

It is alleged that, pursuant to said agreement, George S. Redhead did pick out the requisite number of bulls, and on July 1, 1901, plaintiffs tendered a delivery of them to defendant on the cars at Des Moines, Iowa, but defendant refused, and has ever since refused, to receive or pay for said animals. On these allegations the plaintiffs, expressing their continued readiness to make the delivery, demand judgment for the contract price. The second count of the petition restates the foregoing allegations of fact, and seeks to recover an additional sum for services rendered and expenses incurred in keeping the bulls from the date when defendant refused to receive them. Answering the petition, the defendant admits the making of the contract, and admits that said plaintiffs did tender the delivery of twenty bulls, but denies that they were of the kind, character, or description designated in the written agreement. Further answering, de-

defendant says that George S. Redhead, mentioned in the contract, was a member of the plaintiff firm, and represented himself as being a man of experience and skill in the business, and as having special knowledge of the quality, fitness, and value of bulls for the purposes for which they were being purchased, and would give defendant the benefit of his knowledge and experience in the selection of first-class animals, and that, relying upon such representations and promises, defendant entered into said contract. It is further alleged that from and after April 1, 1901, defendant was ready and willing to carry out the contract according to its terms, but the bulls picked out by the said George S. Redhead and tendered to defendant were of inferior quality, unfit for the purposes for which the purchase was made, and were not of the kind, quality, or value called for by the contract, for which reason the tender was refused. The defendant also pleaded a counterclaim, which was subsequently withdrawn by the court from the jury, and is not involved in this appeal. Some months after the issue was joined, plaintiffs amended their petition, stating a claim for damages on account of the defendant's alleged breach of the contract of purchase, to which defendant answered that, by instituting the suit for a recovery of the contract price of the bulls, plaintiffs were bound by their election of said remedy and waived their right to a recovery of damages. There was a trial to a jury, and verdict for the plaintiffs in the sum of \$2,747.50. A motion for a new trial was overruled, and from the judgment rendered upon such verdict the defendant appeals.

I. The appellant urges that a claim to recover the full contract price as for a completed sale, and a claim to recover damages for defendant's refusal to accept the property, are of such inconsistent nature that, having brought suit upon the former, plaintiffs are bound by the election thus made, and must recover upon that theory or not at all. The point is pressed upon our at-

1. SALES: breach
of contract;
election of
remedies.

tention with much earnestness, but we think it cannot be sustained. If the two claims asserted by plaintiffs were essentially inconsistent, the rule relied upon by counsel might well be invoked. In no case decided by this court has the election of remedies been more thoroughly considered than in *Elevator Co. v. U. P. Ry. Co.*, 97 Iowa, 719. Upon a careful review of the authorities it was there said: "A man may not take two contradictory positions, and where he has two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him from thereafter going back and electing again."

In the case at bar the claim presented by the amendment involves no repudiation or denial of the facts alleged in the original pleading. Both demands are based upon the theory of an enforceable contract of sale, and a refusal of the defendant to receive and pay for the property. If plaintiffs were right in their contention, and had made a good and sufficient tender of delivery, they could keep their tender good and recover the full contract price; or, if the market value of the property was less than the contract price, they could give defendant credit for such value and recover the difference as damages. If, after having brought suit for the contract price, plaintiffs concluded that, in view of a protracted contest, it was better to avoid the accumulating burden which the keeping of the animals in readiness for delivery would involve, and to modify their claim to one for damages, we see no good reason why it should not be permitted. Or if, after beginning their action and before trial, they discovered that a demand for the purchase price was not sustainable, we think they were at liberty to abandon it, and, by amendment or by the institution of a new suit, ask a recovery in damages. The claim in either case is based upon the written contract, and, in one form as well as in the other, a re-

covery gives the plaintiffs neither more nor less than the benefit of the sale which the contract witnesses. If the defendant's theory of the facts be correct, there was never a completed sale, and the title to the property never passed. If this be true, plaintiffs' action to recover the contract price could not be sustained, and in such case the abandonment of that claim and the setting up of a claim for damages would not violate the rule as to the election of remedies, because no remedy under the first form of their demand had ever been open to them. In other words, an election exists only where two or more inconsistent remedies are open to the party and he is at liberty to pursue any one of them. It cannot exist between consistent and concurrent remedies, or between a rightful remedy and one which the party may mistakenly suppose to be applicable. As bearing more or less directly upon this view of the law, see 7 Encyclopædia Pleading and Practice, 362; *Ames v. Moir*, 130 Ill. 582 (22 N. E. Rep. 535); *Kingsbury v. Kettle*, 90 Mich. 476 (51 N. W. Rep. 541); *Wright v. Ritterman*, 1 Abb. Prac. (N. S.) 428; *Kinny v. Kiernan*, 2 Lans. 492; *Smith v. Bricker*, 86 Iowa, 285.

II. Concerning the alleged tender, the evidence tends to show the following facts: A few days prior to July 1, 1901, one of the plaintiffs called upon the defendant's representative, D. H. Kooker, in the city of Des Moines, and had some conversation with him regarding the delivery of the bulls, and Kooker expressed a wish to see the animals. It was arranged that he should go to the plaintiffs' farm for that purpose, and on July 2d the visit was made. George S. Redhead pointed out to Kooker two pens containing ten bulls each, and informed him that these were the animals which he had selected and proposed to deliver in fulfillment of the contract. One lot of ten was represented as registered thoroughbreds, while the other lot was unregistered, but was claimed to come within the terms of the agreement. Kooker objected to the last-mentioned lot, not only because they were unregistered,

2. TENDER:
damages;
instructions.

but also because of their alleged inferior quality, and refused to accept them. At some time during this visit Kooker made a request for a list of the bulls, but it was refused, or, at least, was not then furnished. The interview seems to have ended with no definite understanding between the parties. On the following day one of the plaintiffs called upon Kooker, giving him a list of the names, registry numbers, and ages of twenty registered bulls which they offered to deliver, but Kooker refused to accept them for the defendant. The list referred to included the ten registered bulls which had been offered to Kooker on the preceding day, and ten others which George S. Redhead had thereafter selected and substituted in place of the ten which were unregistered. In this latter selection was a calf then but little more than five months old. While plaintiffs allege a tender of the bulls called for by the contract, and defendant admits that a tender was made, it appears that the allegations and admission do not refer to the same offer. As we have already noted, the testimony on part of the plaintiffs tends to show two separate and distinct offers to deliver — one on July 2d, of twenty bulls, only ten of which were registered; and another on July 3d, of twenty bulls, all registered. Defendant claims that its admission has no reference to the offer which plaintiffs claim to have made on the latter date, and denies that any offer or tender of the twenty registered animals was ever made. Upon this phase of the controversy the court instructed the jury as follows:

Fifth. The evidence in this case discloses that the plaintiff offered to the defendant, on the 2d day of July, twenty bulls, all of which he claimed were pure-bred selected Hereford bulls, but ten of which were not registered bulls. And with regard to this tender you will determine whether or not the same was rejected by the defendant at the time it was made; and, if you find from the testimony that it was rejected, you will then consider and determine, as in these instructions defined, whether or not the bulls so tendered

were a substantial compliance with the contract between the parties; and, if the same was not a substantial compliance with the said contract, you will then find for the defendant. But if you find that the said tender was not rejected by the defendant, and that, for any reason whatsoever, the said tender was neither accepted nor rejected, then the plaintiff would have the right, if, in his judgment, fairly and honestly exercised, he concluded that twenty bulls, all of which should be registered, would better meet the requirements of the defendant, to modify the tender which he had made by tendering to the defendant such registered bulls. *And if you find that the tender of the plaintiff was, under the circumstances above referred to, modified, and a second tender made in an honest effort by the plaintiff to meet the requirements and best interests of the defendant, then, if either of the said tenders was such as would be a substantial compliance with the said contract, the plaintiff will be entitled to recover.*

The giving of this instruction as modified by the clause which we have italicized was error. At this stage of the case plaintiffs were no longer seeking to recover the full contract price, but the difference between the contract price and the value of the bulls which they had tendered to defendant in performance of the contract. For that purpose they clearly elected to rely upon the tender alleged to have been made on July 3, 1901, of twenty registered bulls, which they list and particularly describe in testimony. It is the market value of this particular lot of twenty registered bulls of which they offer evidence on the trial and with which they propose to credit the defendant. No attempt is made to show the value of the ten unregistered bulls alleged to have been tendered on July 2d, and testimony as to these animals and the disposition which had been made of them was excluded upon plaintiffs' objection. Bearing this condition of the record in mind, the error pointed out in the instruction under consideration will readily be apprehended. It directed the jury that if a tender was made and refused on July 2d, and a different or "modified" tender was made and refused on

July 3d, and either of said tenders was in substantial compliance with the contract, then plaintiffs were entitled to recover. This direction would allow the jury to find for plaintiffs upon the tender of ten registered and ten unregistered bulls, and to assess the damages on the basis of the contract price as compared with the market value of the twenty registered bulls. It is obvious that proof of a tender of a specific lot of bulls, without any proof of their actual market value at the time and place, afforded the jury no basis on which to estimate or compute damages; and certainly proof of the tender of a specific lot on July 2d, and of the value of another and different lot tendered on July 3d, would be equally objectionable. Whether this instruction would have been proper in an action to recover the entire contract price, it is not necessary for us to decide under the issues as they now stand; it is sufficient to say that as a rule of damages it was misleading and therefore prejudicial.

III. The extent of the authority given by the contract to George S. Redhead is a matter to which counsel have given considerable attention in argument, and, without extending this opinion to discuss the various propositions advanced, we think that his discretion in picking out the bulls was confined to a selection from pure-bred Hereford stock of good quality and of suitable age and condition for the uses and purposes for which plaintiffs knew the purchase was being made. It is conceded in the record that one of the bulls included in the list alleged to have been tendered on July 3d was a calf of five months, and defendant also contends that others were so old as to be without substantial value. Plaintiffs knew that defendant intended these animals for use for breeding purposes upon its ranch in Wyoming, and, in the absence of other specifications, we think they were bound to select and deliver such only as were then suitable for that use, and whether this duty was performed was a question for the jury.

3. SALES: duty
of vendor.

Proceeding on that theory, defendant sought to prove

by expert witnesses that a calf of five months was not fitted or adapted to use for breeding purposes, but the testimony

was excluded on plaintiffs' objection. For the reasons already given, it should have been admitted. To hold otherwise is to say that, if

George S. Redhead had picked out and plaintiffs had tendered the delivery of twenty immature calves, defendant would have been bound to accept them in full satisfaction of plaintiffs' undertaking to sell twenty thoroughbred Hereford bulls of the age, quality, and condition required for breeding purposes. Such an interpretation of the contract, it is very apparent, was not within the contemplation of the parties.

The suggestion in argument that the calf tendered by plaintiff was the most valuable of the entire lot does not answer this objection. The money value of the animal is

not the standard by which compliance with the contract is to be determined. Among the defendant's requests for instructions to the jury, the fifth was based upon the proposition we have here affirmed, that plaintiffs were under obligation to deliver bulls suitable and fit for use in the breeding season of the fall of 1901, and the refusal to so instruct was error.

IV. If plaintiffs made a tender of the bulls in substantial compliance with the contract, and such tender was refused, it was doubtless their right to proceed at once to

sell the animals on defendant's account, and, if

less than the contract price was realized, to recover the difference in a proper action therefor.

They do not claim to have done this, but pursued the alternative course of retaining the bulls and making claim for the alleged excess of the contract price over the actual or market value of the property at the time and place named in the agreement. The testimony tends to show that the selling season for animals of this kind extends from early autumn until late spring, and that during July, and perhaps August, the demand is practically suspended, or, at best,

4. SALES: compliance with contract; evidence.

5. SALES: compliance with contract.

6. SALES: damages; market value.

is light and irregular. It was the theory of plaintiffs that on July 1st there was no market for these animals for breeding purposes, and that their value was simply what could be realized by their sale for beef, being from two to three cents per pound for gross weight. It is upon this basis that the claim for damages is made. The court instructed the jury that plaintiffs' measure of recovery, if anything, was the difference between the contract price of the bulls and their reasonable market value at the date of the tender. It also defined reasonable market value as "the price that animals of the kind and character specified in the contract and tendered to defendant, would bring in the open market at the time of such tender." The jury were further told that in determining this value they should take into consideration the breeding and quality of the animals, the demand for such property for any purpose, and, if there was a market therefor on which they would command a greater price than for butcher stock, such greater value should be adopted in computing the damages. To this the court added: "But you should ascertain the value of those animals on the day they were tendered to defendant, whatever it may be, and, if the plaintiffs are entitled to recover, allow them the difference between that market price and the contract price as hereinbefore explained to you."

We think the court was correct in saying to the jury that the "value of the animals on the day they were tendered" is the value which is to be compared with the contract price in ascertaining the damages, if any. But the instruction as a whole seems capable of being construed to mean that, if on that particular day there was no demand for the bulls for breeding purposes, the plaintiffs could elect to hold them and credit defendant with their value as butcher stock. This, in our judgment, is stating the rule of law too narrowly, and might easily result in great injustice. It may be assumed as a matter of common knowledge that thoroughbred Hereford bulls of suitable age and condition

for breeding purposes are not ordinarily reared, bought, or sold upon the open market or otherwise for beef. Doubtless when, by reason of age or misfortune, they are no longer of value as breeders, they find their way under some disguise to the meat market, but it was not this class or kind of animals which the plaintiffs undertook to sell. Now, if it be true, as we have said, and as the testimony tends to show, that in the midsummer season there is no "open market" for bulls for breeding purposes, it does not necessarily follow that plaintiffs were entitled to retain them and credit defendant with their comparatively nominal value as butcher's stock. The mere fact that no sales were being made on July 1st for breeding purposes is not conclusive of the fact that the animals had no market value for such purposes. Market value has been said to be such sum of money as the property is worth in the market generally to the persons who would pay the just and full value, or what the property would bring at a fair sale where one party wants to sell and the other to buy. *Low v. R. R.*, 63 N. H. 557 (3 Atl. Rep. 739; *Esch v. R. R.*, 72 Wis. 231 (39 N. W. 129); *Kansas City R. v. Fisher*, 49 Kan. 17 (30 Pac. Rep. 111); *Lawrence v. Boston*, 119 Mass. 128.

In *Bullard v. Stone*, 67 Cal. 480 (8 Pac. Rep. 17), speaking of the buyer's remedy against the seller, market value is said to mean the price or sum for which an equivalent could be reasonably and fairly purchased at or near the place where the property should have been delivered, and *within a reasonable time after* a refusal to deliver. In *Railway Co. v. Woodruff*, 49 Ark. 390 (5 S. W. Rep. 792; 4 Am. St. Rep. 51), it is defined as the price which a vendor can obtain after *reasonable and ample time taken to effect a sale*. The rule thus stated, especially as applied to a case where the seller does not exercise his option to sell the property on the buyer's account, commends itself to our ideas of fairness between the parties. We think it safe to say that if, according to the usual and known method of trade, such property com-

manded materially better prices for breeding purposes than for slaughter, and the market demand therefor was confined to the season between September 1st and June 1st, and the day fixed for the delivery was within the period when no such demand existed, then, in considering the value of the animals for breeding purposes, the absence of a present or immediate demand did not of itself establish their want of market value for such purposes within the meaning of the law; but the jury should have been allowed in this connection to take into consideration the fact that the market season would soon reopen, and to look at such sales of similar property as the testimony might show were made in that vicinity within a reasonable time both before and after the date of the tender. *Conner v. Baxter*, 124 Iowa, 219; *Cahen v. Platt*, 69 N. Y. 348 (25 Am. Rep. 203). If, upon a full and fair review of all pertinent facts, it should be found that the bulls, although fit and suitable for the purposes contemplated in the contract, were nevertheless worth more as butcher's stock, then, of course, their value for the latter purpose would be the basis for computing damages, but not otherwise. Let us emphasize the reasonableness of the rule by supposing that the property to be delivered is a threshing machine to be delivered in midwinter, when there is neither demand nor employment for such machinery; could the seller, upon this offer of delivery being refused, retain the property, giving the purchaser credit for its value as old iron and firewood, because there was no immediate market demand for threshing machines? The inquiry answers itself. It would seem entirely competent in such case to consider the prevailing prices for such property during the season just closed, the occasional sales, if any, since the close of the season, the sales made within a reasonable time after the tender, and the apparent prospect or outlook for the trade in the approaching season, and therefrom, with due regard for the expense and risk of holding the property until the trade reopens, find its fair

and reasonable value for the purposes for which it is specially designed and fitted.

The defendant attempted, but was not allowed, to show by plaintiffs that within a short time after the alleged tender they sold the bulls for breeding purposes at a price much in excess of the value to which they now testify.

7. MARKET VALUE: evidence. The testimony was competent and material, both as tending to show that there was in fact a market demand for such property at or about the date of the tender, and as having some weight upon the disputed question of values. *Camp v. Hamlin*, 55 Ga. 259; *Peters v. Cooper*, 95 Mich. 191 (54 N. W. Rep. 694). The objection to this testimony should have been overruled. It is to be understood, of course, that it is the value of the bulls on the day they were to be delivered which is to be found, and proof of sales at other times either before or after that date is to be considered only for what the jury may find it worth in determining that ultimate fact.

V. Exception is taken to the withdrawal of defendant's counterclaim from the jury, but, in our judgment, the evidence would not sustain a finding thereon in defendant's favor, and the court did not err in refusing to submit it. Many other alleged errors are assigned and argued, but the questions thus presented are governed by the conclusions already stated, or are of a nature not likely to arise on a retrial.

For the reasons stated in this opinion, the judgment below is reversed.

A. K. RESNER, Appellee, v. CARROLL COUNTY, Appellant.

Contagious disease: COMPENSATION OF PHYSICIAN: LIABILITY OF 1 COUNTY. Under section 2570, Code of 1897, the liability of a county became absolute for the bill of a physician employed by a local board of health to attend a person afflicted with contagious dis-

case, as the same was allowed by the board of health, where it appeared that the patient and those liable for his support were unable to pay.

Same. A board of supervisors had no authority under Code of 1897 to reduce the bill of a physician for attending a smallpox patient, where the same had been audited and allowed by the board of health, and the acceptance of a portion of the sum did not bar a claim for the balance, in the absence of agreement.

Appel from Crawford District Court.—HON. Z. A. CHURCH, Judge.

TUESDAY, JANUARY 17, 1905.

PLAINTIFF is a physician residing in the town of Manning, Carroll county. In February, 1902, he was called upon by the local board of health to attend one Rose, transiently in said town, and afflicted with smallpox. Having completed the service, he presented his bill, amounting to \$240.50, to the local board, and such bill was taken up at a meeting thereof held on April 5, 1902, and on motion was approved and ordered referred to the county board of supervisors. The clerk of the local board handed the bill, with others, to a member of the county board, and it was brought to the attention of that board at its April meeting. It does not appear that the bill was accompanied by any certificate or transcript of the proceedings of the local board. The board of supervisors allowed the sum of \$132 of the amount of the bill, and ordered a warrant drawn accordingly. A few days thereafter, plaintiff, being in the office of the county auditor, learned of the action of the board. He expressed himself as dissatisfied, but finally accepted a warrant for the amount allowed upon condition that the auditor write on the warrant stub or book the words, "Taken under protest," and this was done. On May 15, 1902, plaintiff procured the local board of health to certify to the balance due on his bill as claimed by him, and to forward such certificate to the county board. The latter board again took up the bill

and rejected it, whereupon this suit was brought to recover the sum of \$180.50, the balance of the bill as rendered. From a verdict and judgment in favor of plaintiff, the defendant appeals.— *Affirmed*.

C. E. Reynolds, for appellant.

Douglas Rogers and Connor & Lally, for appellee.

BISHOP, J.— At the close of the evidence defendant moved for a directed verdict, one of the grounds therefor being that the acceptance by plaintiff of the amount allowed

1. CONTAGIOUS DISEASE: compensation of physician; liability of county. by the county board operated as a settlement in full of his demand against the county. This motion was overruled, and the case was submitted to the jury upon the sole question as to whether or not it had been made to appear that neither Rose nor those liable for his support were financially able to pay for the services rendered to him. The statute in force at the time the services were rendered and the bill approved and presented to the county board provided that persons found to be afflicted with smallpox should be taken charge of and cared for by the local board of health, the expense thereof to be charged to such person, or those liable for his support, if able; otherwise such expense to be charged to the county. Code 1897, section 2570. And under the statute as it then stood the power to fix the fees or charges — those of the physician, for instance — was in the local board of health. The county board had no right to regulate such fees or charges. Its duty was to order the same paid as audited and approved by the local board. *Tweedy v. Fremont County*, 99 Iowa, 721. It follows that when the local board met and approved the bill of plaintiff, and it being true that the patient and those liable for his support were unable to pay, the indebtedness against the county became absolute. And this is true without reference to certification, or the want thereof, to the county board.

Now, while the bill of plaintiff might have been made the subject of a settlement, yet, in our view, the facts here disclosed do not warrant such a defense. The board bound no one by its action in allowing a portion of the bill and rejecting the rest. As the demand of plaintiff against the county was of a fixed and definite sum, he waived no right by taking the amount allowed. He had no conference with the board, which alone was authorized to act on the part of the county, and the acceptance of part of a fixed sum due does not operate to bar a claim for the balance unless mutually agreed, and upon consideration. In the case of an unliquidated demand a different rule may obtain, and such was involved in the cases cited and relied upon by counsel for appellant.

Some question is made respecting the employment of plaintiff with reference to the time of his rendition of a part of the service claimed for. We do not think the informality relied upon sufficient to defeat a recovery. It is also contended that errors were committed in connection with the admission of the evidence respecting the financial ability of the patient and his relatives. We have read the record with care, and conclude that there was no prejudicial error.

The verdict had support in the evidence, and the judgment is *affirmed*.

JOHN MCKINNON AND WIFE, V. CEDAR RAPIDS AND IOWA
CITY RAILWAY & LIGHT CO., Appellant.

Eminent domain: RIGHT-OF-WAY: DAMAGE: APPEAL. Where a railway company appealed from an award of damages in a condemnation proceeding for right-of-way, an appeal by the landowner was not necessary in order that he might procure a larger award on the trial of the company's appeal.

Condemnation: APPEAL. Where both the railway company and landowner appealed from an assessment of damages for right-of-way and

the two appeals were consolidated, after which the company dismissed its appeal without objection, the order of the district court in refusing to dismiss the landowner's appeal and affirm the assessment will not be reviewed.

Appeal from Linn District Court.—HON. B. H. MILLER,
Judge.

TUESDAY, JANUARY 17, 1905.

APPEAL from action of the lower court in overruling the motion of defendant to affirm an allowance of damages made in a condemnation proceeding, from which the plaintiff—that is, the landowner—had appealed.—*Affirmed.*

John A. Reed, for appellant.

No appearance for appellee.

McCLAIN, J.—In a condemnation proceeding instituted by the railroad company to have damages assessed for a right of way over plaintiff's land an award was made, and the company served notice of appeal, and had the appeal docketed, as provided by Code, section 2009. Thereafter the plaintiff (that is the landowner, who, by the provisions of the sections just cited, is to be treated as plaintiff) also served notice of appeal, and caused a transcript of the proceedings to be filed with the clerk of the district court, but did not pay any filing fee. The railroad company thereupon caused an appeal by the landowner to be docketed, paying the filing fee, and asked the district court by motion to affirm the assessment of the sheriff's jury, under the provisions of Code, section 3660, for failure of the plaintiff to prosecute his appeal by having the same docketed. The trial court overruled this motion, and ordered the so-called appeal of plaintiff to be consolidated with that taken by the railroad company from the same assessment. The company then dismissed its appeal in the district court and now complains of the action of that

court in overruling the motion to dismiss the plaintiff's appeal.

It is apparent that the case before us presents nothing but a question of costs. No appeal by the landowner to the district court was necessary, after the company had already appealed, in order that the landowner might get larger damages than those awarded by the sheriff's jury should he be found entitled to them on the trial of the company's appeal. See Code, section 2009, 2011. Perhaps he was entitled to serve a notice on his own account, and have the sheriff transmit any portion of the finding of the sheriff's jury not already transmitted in response to the company's notice. However that may be, plaintiff has not objected, so far as appears, to the dismissal of the appeal by the company, made after the order of consolidation. We cannot see what possible advantage would accrue to the company from a reversal of the ruling by which the district court refused to dismiss the landowner's appeal, if one was taken, which has already been, in effect, dismissed by the dismissal of the company's appeal, with which it has been consolidated. We do not try mere abstract or hypothetical cases.— *Affirmed*.

JOSEPH M. CHRISTY, AND E. M. STEDMAN, Appellants, v.
DES MOINES CITY RAILWAY CO.

Street railways: NEGLIGENCE: INSTRUCTIONS. In an action for in-

- 1 juries resulting from collision with a street car, instructions directing a verdict for defendant if plaintiff failed to show freedom from contributory negligence, and enumerating the acts of negligence relied upon, except failure of the motorman to stop the car after he saw plaintiff's peril, and further charging that if the jury failed to find any of the acts of negligence, their verdict should be for defendant, were inconsistent with another charge that, though plaintiff was negligent yet defendant would be liable if its employes saw plaintiff and knew of his peril and failed to use ordinary care to prevent the injury.

126 428
d130 270
d130 544

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131 735

126 428
133 248

126 428
e134 405

126 428
140 329
p141 697

Instructions. In a personal injury action, it is proper to submit
2 defendant's theory of the case, though supported by the testimony
of but one witness.

Negligence: INSTRUCTIONS. In submitting defendant's case as dis-
3 closed by his evidence, the court should also state the situation
in the same way so far as favorable to the plaintiff and arising
out of the same evidence.

Negligence: EVIDENCE. In an action for injuries sustained by the
4 alleged negligent operation of a street car, the offer of city ordi-
nances regulating its operation, which are simply an affirmation
of the rules of law, should be rejected.

Suit by bankrupt: PARTIES. A defendant cannot complain that the
5 plaintiff, having been adjudged a bankrupt after the trial, prose-
cutes the appeal in his own name, the trustee in bankruptcy hav-
ing filed his written consent thereto.

Appeal from Polk District Court.—HON. WM. H. Mc-
HENRY, Judge.

WEDNESDAY, JANUARY 18, 1905.

ACTION for damages resulting in a verdict and judgment
for defendant. The plaintiffs appeal.—*Reversed.*

*Carr, Hewitt, Parker & Wright and C. C. & C. L.
Nourse*, for appellants.

N. T. Guernsey, for appellee.

LADD, J.—The defendant operates a street railway on
Ninth street in Des Moines. The plaintiff, accompanied
by a niece, and driving a span of three year old colts hitched
to a cutter, was approaching the track from the east on State
street. In crossing the cutter was struck by one of de-
fendant's cars coming from the south, and demolished. The
plaintiff was permanently injured, and one of the horses
so disabled that it was subsequently shot. The city ordi-
nances prohibited the defendant from moving its cars at a
higher speed in the residence portion of the city than twelve

miles per hour. Considerable evidence tended to show that this one was moving at the rate of fifteen to twenty miles per hour, and if so, the circumstances were such that it might have been found that, had the speed not exceeded that allowed by ordinance, the collision would not have occurred. The jury specially found that, as the car approached the street intersection, its speed did not exceed eight miles per hour. The motorman, corroborated somewhat by the conductor, testified that he slowed the car down to about four miles per hour, that Christy stopped his team, and, as he turned their heads, as if to drive to the south around the car, it started again, when the team became frightened, and lunged in a northwesterly direction in front of the car. A more particular statement is not essential to an understanding of the questions raised.

I. Appellant contends that the first, fourth, and eighth paragraphs of the court's charge are inconsistent, and because thereof tended to mislead and confuse the jury. In the first

it is said that the burden of proof is on plaintiff to establish three things: " (1) That he was injured and his property destroyed by the car of the defendant at the time and place mentioned in the evidence, substantially as alleged in his petition. (2) That said injury was the natural and proximate result of negligence on the part of the defendant. (3) That the plaintiff was free from any negligence which contributed to his injury or the destruction of his property. And if the plaintiff has proven each and every of the said propositions by a preponderance of the evidence, you will find for the plaintiff; but if he has failed to establish any one of said propositions by a preponderance of the evidence, your verdict will be for the defendant." It will be observed that upon the failure to find that plaintiff was free from any negligence a verdict for defendant is directed. The fourth instruction enumerated the grounds of negligence alleged in the petition.

1. NEGLIGENCE:
instructions.

In approaching the crossing of State street and Ninth street without ringing the bell or gong, or making any other signal; by running over said crossing at the time at a great, dangerous, and unlawful rate of speed, and at a rate of speed greater than twelve miles per hour; in failing to keep a lookout for persons passing and repassing upon the said streets; in failing to stop the said car after the defendant's motorman saw the plaintiff approaching the said crossing, and in not having stopped the car after the said motorman saw the danger and peril of the plaintiff.

The undisputed facts are then recited, and the court proceeds:

If, therefore, you find from the evidence that the defendant, by its employés in charge of said car, approached the said crossing without ringing a bell or gong or giving any other signal of its approach; that said car was at the time running over said crossing at such a rate of speed as to endanger the lives of persons traveling over the same, or at a rate of speed greater than twelve miles per hour; that its employés in charge of the car failed to slow up the said car before reaching the said crossing; and if you further find that the defendant's employés in charge of the said car in any or all of the said particulars, under all the circumstances surrounding them at the time, did not exercise reasonable and ordinary care in and about the management of the said car while approaching and passing over said crossing — then you will be warranted in finding that defendant was negligent; and if, by reason of such negligence, you further find that plaintiff sustained injury, without fault or negligence on his part, which directly contributed to said injury, then you will find for the plaintiff. But, if you fail to so find, then your verdict will be for defendant.

Thus, after repeating the four grounds of negligence, the last is entirely eliminated from the hypothetical statement of facts, and the jury instructed, upon failure to find any one of the other three, or freedom from negligence on the part of plaintiff, "your verdict will be for the defendant."

It may be that the word "verdict" was intended in the sense of "finding," and what was meant was verdict for defendant as to the particulars previously mentioned. But it is not so limited, nor is this the necessary import of the language. In the twentieth instruction attention is directed to the forms of verdict attached, designated as verdicts, and in the instruction following the final conclusion is referred to as a verdict. The jury might have concluded that "verdict," as found in the above instructions, had reference to the determination of the case by them, and to be expressed in one of the forms accompanying the charge; and, if so, these paragraphs were inconsistent with the eighth instruction, in which the jury was advised that:

If, under all the evidence and the foregoing instructions, you find that the plaintiff was negligent, still the defendant cannot avoid liability, if you further find from the evidence that the plaintiff at the time in question was in a perilous position, and that the defendant's employé in charge of the said car saw the plaintiff, and knew that he was in such perilous position, or might have known he was in peril by the use of ordinary care after he saw him, and thereafter failed to use ordinary care to stop the car and prevent the injury of the plaintiff; and if you further find that by the use of ordinary care defendant's employé in charge of the said car, under such circumstances, could have avoided any injury which you find the plaintiff may have sustained, then the plaintiff will be entitled to recover, and you will find for the plaintiff; but, if you fail to so find upon this part of the case, you will find for the defendant.

True, the instructions are to be read together, as argued by appellee, but this does not wipe out the conflicting statements contained in those quoted. The case is readily distinguishable from *McKern v. City of Albia*, 69 Iowa, 447. There the jury was told, in substance, that, if the city was charged with notice of the defect in the walk, to find for plaintiff. Manifestly, this meant as to that particular matter, or in event the other issues submitted in the instructions

and declared essential to recovery were found for her. The instruction contained no direction as to what verdict to return. In *State v. Calkins*, 73 Iowa, 128, the defendant was accused of uttering a forged instrument, and in one instruction the element of knowledge was omitted. As it was to be implied, however, and another instruction explicitly stated that it was essential to conviction, no prejudice could be said to have been suffered. In *Riegelman v. Todd*, 77 Iowa, 696, and also in *Perpetual B. & L. Ass'n v. U. S. Fidelity & Guaranty Co.*, 118 Iowa, 729, the general statement as to the burden of proof in the case required all the defenses to be established by a preponderance of the evidence, but as the instructions following each defense were specifically submitted with direction that, if sustained, the verdict should be for defendant, it was thought that the jury must have understood the general statement to relate to the burden of proof merely, and could not have been misled into supposing "more was required than specifically stated as essential in considering the several defenses to justify a verdict." The instant case is ruled by *Quinn v. C., R. I. & P. R. Co.*, 107 Iowa, 710. There the deceased went between moving cars to uncouple them, when his foot was caught in a defective switch, and he was run over. The defendant pleaded that the risk was assumed. In the fifth instruction the court told the jury that, if the injury was caused by defendant's negligence, without any fault on the part of deceased, the verdict should be for plaintiff; and, although instructed fully in another paragraph concerning his alleged assumption of risk, it was held that, "as the fifth paragraph instructed the jury in plain terms to return a verdict for the plaintiff if the statements set out were proven, it was to that extent in conflict with the other paragraph, and of a nature to confuse the jury." To the same effect, see *Meyer v. Boepple Button Co.*, 112 Iowa, 51.

These decisions are directly in point and, following them, paragraphs 1 and 4 of the charge must be declared erroneous

and prejudicial. Appellee suggests lack of prejudice, in that a verdict for plaintiff would have been without support in the evidence. Without reviewing the record, we are content to say that the evidence was sufficient to carry the case to the jury.

II. In the ninth instruction the theory of the defendant was submitted to the jury. That this was proper, even though supported by the testimony of but one witness, cannot well be questioned. We set it out as the best response to the criticisms of appellant:

2. INSTRUCTIONS: If you find from the evidence that the motorman in charge of the car in question slowed up the car, or stopped it, at the intersection of Ninth and State streets, expecting that the plaintiff's team would pass in front, and that thereupon the said motorman noticed the heads of plaintiff's team turning towards the south as if to pass behind the car; and if you find that the said motorman believed, and had reason to believe, that it was the intention of the plaintiff to turn southward, and pass behind said car, and that thereupon the motorman moved the car forward to give the plaintiff more room in which to pass behind said car, and that the plaintiff's horses thereupon became frightened, and started suddenly toward and in front of the said car, and were by that means struck by the car; and if you conclude from such facts, if such you find to be the facts, that the accident occurred without negligence on the part of the defendant, as defined to you in these instructions — then your verdict will be for the defendant.

It will be observed that the facts as recited by the motorman are hypothetically stated, and not assumed, as contended, and that even then recovery is denied only on condition that the accident occurred without any negligence on the part of the defendant. The exceptions urged are based on the exclusion of this last clause, and of course, without it the instruction would have been erroneous. With it, the instruction is not vulnerable to the criticisms urged.

III. But the court might well have been more explicit.

in referring to the negligence of the defendant. Even though the motorman, acting as an ordinarily prudent person, might have supposed that plaintiff was attempting to drive behind the car, it was still a question whether, acting as an ordinarily cautious man, he should have started the car forward before the plaintiff had done so. And, even if he was not at fault in moving the car forward, yet if it had slowed down to four miles per hour, and he observed, immediately after moving it forward, that plaintiff's horses were frightened, had changed their course, and were undertaking to pass in front of the car, it was his duty to stop the car, if it could have been done, in the exercise of reasonable care, in time to avoid the injury. In other words, in submitting the theory of the case raised by the evidence introduced by defendant in the concrete, the situation, in so far as favorable to the plaintiff, and arising out of the same evidence, should also have been stated in the same way, rather than merely by reference to negligence in the abstract.

IV. The following ordinances were excluded from evidence on objection by defendant because merely expressive of rules of law independent of such regulations: "(6) Conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track the car shall be stopped, when by so doing such danger can be averted. (7) All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons, and other vehicles." The ruling was correct. In the use of the streets the company was bound to exercise reasonable care, and in doing this must pursue such a course as will avoid injury to persons and property. If, to avert danger, the stopping of the car is necessary, it seems unnecessary to say that it must be stopped regardless of what the city council may think about the matter. See *Jeffrey v. Ry. Co.*, 51 Iowa, 439; *Mosnat v.*

3. NEGLIGENCE:
instructions.

4. NEGLIGENCE:
evidence.

Ry. Co., 114 Iowa, 151; *Isaackson v. Ry. Co.*, 75 Minn 27 (77 N. W. Rep. 433). See *Hart v. Cedar Rapids & M. C. R. Co.*, 109 Iowa, 631.

V. After the trial plaintiff was adjudged a bankrupt, and on motion of defendant the trustee was substituted as plaintiff about a year after the verdict was returned. Thereupon the trustee filed his written consent that

6. SUIT BY
BANKRUPT: . Christy prosecute the action in his own name.
parties.

That, under these circumstances, the plaintiff was authorized to prosecute the appeal, there can be no doubt. *Thatcher v. Rockwell*, 105 U. S. 467 (26 L. Ed. 949); *Brown v. Wygant*, 163 U. S. 624 (16 Sup. Ct. 1159; 41 L. Ed. 286); *Sullivan v. Rabb*, 86 Ala. 440 (5 South. Rep. 749); *Lancey v. Foss*, 88 Me. 218 (33 Atl. Rep. 1072). The trustee might decline to take the cause of action, and leave it to the bankrupt, and, having done so, the defendant cannot be heard to complain. As to it this was *res inter alios*. Whatever he may do hereafter by way of appropriating the proceeds of the litigation can in no way affect the defendant.— *Reversed*.

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| 126 | 436 |
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BARTOL NELSON, Plaintiff, v. HARRISON COUNTY ET AL.,
Defendants and Appellees, E. F. OGDEN, Defendant
and Appellant, W. A. SMITH, ET AL., Inter-
veners and Appellants.

Counties: POWER OF SUPERVISORS. Under the statutes, the manage-
1 ment and control of county property is entrusted to the board
of supervisors, and unless its acts are in bad faith and amount to
a fraud upon the county the courts will not interfere.

Contract with county: VALIDITY: PARTIES. The invalidity of a
2 contract made by a county and the issuance of a warrant there-
under, cannot be determined in a suit between the county and its
treasurer to restrain the payment of the warrant, to which the
person with whom the contract was made and warrant issued was
not a party.

Contracts with county: VALIDITY: EVIDENCE. Any contract entered
3 into by a board of supervisors to furnish the county supplies, materials, or labor, which is with or for the benefit of any member of the board, is void to the extent of such member's interest therein. Evidence held to show the contract in suit void as to the interest of a supervisor therein.

Swamp lands: USE OF PROCEEDS: STATUTES. A county may use the
4 proceeds arising from the sale of swamp lands granted to it by the swamp land act of 1850 in the construction of roads through the swamp land district, without submitting the question to a vote of the people, notwithstanding the subsequent act of 1858 which is held to require such submission in case roads are to be constructed outside the swamp land district.

Contract with county: FRAUD. A contract for improvement of a
5 highway made through an arrangement with and for the benefit of a member of the board of supervisors, is fraudulent and void.

Same. A contract prohibited by statute is void, and where county
6 warrants in whole or in part are issued to members of a board of supervisors on either an express or implied contract to furnish the county materials or labor, the same should be cancelled or reduced by the court to the lawful amount, though in the hands of a third party.

Same. Warrants issued in payment of material greatly in excess of
7 the county's need, and at exorbitant prices, and under circumstances indicating collusion and fraud, should be cancelled by the court or reduced to the proper amount, though held by a third party.

Appeal from Harrison District Court.—HON. A. B. THORNELL, Judge.

WEDNESDAY, JANUARY 18, 1905.

ACTION in equity originally brought by plaintiff in May, 1902, for an injunction to restrain the issuance of bonds by the defendant county to take up outstanding road and bridge fund warrants of said county, and which warrants are alleged to have been fraudulently and unlawfully issued. The defendants named are Harrison county and B. F. Huff, county auditor; E. F. Ogden, county treasurer; and Arthur Gilmore, W. S. Kelly, and John H. Hall, members of the board of

supervisors of said county. Before trial the plaintiff dismissed his petition, and the case was tried upon issues made up between defendants and W. A. Smith and W. J. Burke, separate interveners. In the main the decree was favorable to the county as against both interveners and the defendant Ogden, and interveners and said defendant appeal. Modified and *affirmed*.

J. S. Dewell and Cochran & Egan, for appellants.

L. W. Fallon, Bolter Bros., and Roadifer & Arthur, for appellees.

BISHOP, J.—The board of supervisors of the defendant county during the years 1899, 1900 and 1901, was composed of J. O. Pugsley, C. H. Hilliard, and G. E. Reiff. During said years a large number of bridge fund warrants of said county had been issued upon the order of the board to the Standard Bridge company in payment of bridge material delivered to the county. Of such warrants there was outstanding on the 25th day of April, 1902, the sum of \$23,368.82. When the present members of the board came into office, they found a large amount of such material on hand, and for much of which, in their judgment, the county then had no use, nor would it have for some years to come. It is quite apparent that some question had been raised as to the validity of the warrants held by the bridge company, and it appears that on the date named the parties came together, and a contract in writing was entered into, whereby the company agreed to take a considerable portion of the bridge material, and pay the county therefor a stipulated price, in consideration of which the board agreed for the county that payment of the warrants held by the company would not be contested. The interveners, Smith and Burke, as taxpayers, attack such contract as in fraud of the rights and interests of the county. They

1. COUNTIES:
power of
supervisors.

do not question the validity of the warrants held by the company, but the contention is that the prices at which the bridge material was agreed to be sold were so far inadequate as to amount to a fraud upon the county. Should we concede that the prices agreed upon were lower than the material would have brought at the hands of a buyer seeking to purchase, still it must be said, as we think, that the amounts named were not unreasonable under all the circumstances, and it seems certain that the board acted with reference thereto in good faith. This being true, there is no warrant for interference on the part of the courts. The care and management of the property and business of the county is intrusted to the board, and not to the courts. It may sell personal property not needed, in its judgment, by the county, and it may compromise claims made by or against the county. Code, section 422; *Sac County v. Hobbs*, 72 Iowa, 69. That the courts may inquire into a gross abuse of the power thus granted is undoubtedly true, but the record before us demands no such exercise of jurisdiction. Our conclusion is in harmony with that reached by the district court.

II. On December 30, 1901, a contract was entered into between the defendant county, acting through its board of supervisors then in office, and one W. T. Roden, for the purchase by the county from said Roden of 80 acres of land in said county at the agreed price of \$5,000. The expressed object of the purchase was to establish a county poor farm. At the time of the contract, by order of the board, a county warrant for the sum of \$1,500 was drawn, and delivered to Roden as part payment of the purchase price of said land; and it was agreed that the remaining \$3,500 should be paid March 1, 1902, when a deed of the land, accompanied by an abstract of title, was to be delivered to the county. The defendant county, in its answer herein filed, attacks the said contract on the grounds of fraud and for a want of power on the part of the board to enter into the same. In a cross-petition against

2. CONTRACT
WITH COUN-
TY: validity;
parties.

its co-defendant Ogden, treasurer, the county alleges that prior to the commencement of this action a resolution was adopted by its present board of supervisors declaring the invalidity of said contract, and directing said Ogden, as county treasurer, not to pay the said warrant so issued for the sum of \$1,500, and that a copy of said resolution was duly served upon him, said Ogden. It is then alleged that, notwithstanding such direction and order, and since the commencement of this action, said Ogden has paid said warrant in full. The prayer is that said warrant be adjudged to have been illegally issued, and that the same in the hands of the said Ogden be canceled, and held for naught. The relief thus prayed was granted by the decree of the district court. In this, we think, there was error. The contract was made with Roden, and the warrant was issued to him. He was not made a party to this action, and it was not competent for the court to determine upon the validity of the contract or warrant in his absence. Ogden was not legally restrained from making payment of the warrant when presented for that purpose. The direction of the board could not have any such effect. That he paid the warrant at his peril, in view of the controversy then pending concerning the validity of the same, and the resolution of the board asserting the invalidity thereof, may be true, but it will be time enough to decide that point when if ever the legality of the transaction shall have been judicially determined as between all the parties in interest.

III. Late in the year 1901, there was established in said Harrison county, by order of the board of supervisors, what is known in the record as the "House Consent Road."

8. **CONTRACTS**
WITH COUN-
TY: validity;
evidence.

Soon thereafter W. A. Smith, intervener and appellant in this case, presented to the board a statement in writing to the effect that a grade or levee was necessary to be constructed on a portion of the line to make the road passable, and proposing to construct the same using dirt to be taken from either end of or along

the grade or from such other place as he might elect, and all to be done for twenty-five cents per yard, measured in the bank. On motion of Supervisor Hilliard, the proposition was accepted, the contract price to be paid from the county swamp-land fund so far as there might be any, and the remainder from the county road fund. It is a fact in the case that thereafter a portion of the work was done, and it also appears that a warrant on the swamp-land fund of the county in the sum of \$565.92 was issued to Smith, by order of the board, to apply in payment for such work. The present board of supervisors of said county having adopted a resolution declaring said contract void and rescinding the same, and directing the treasurer of said county to pay no warrants issued on account of said contract, and notice of all thereof having been given to said Smith, accompanied by a demand for a return of said swamp-land fund warrant, said Smith, as intervener in this case, prays a decree declaring the said contract and the said warrant issued to him to be in all respects valid and binding.

The county, by its answer, contends for fraud and illegality in the contract; alleges that in truth the same was made and entered into for the benefit of Supervisor Hilliard, and that the larger part of the work was done by him, including that for which said warrant was issued; further, as to said warrant, it is said there was no authority in the board to direct the issue thereof except upon vote of the people of the county, which was not had. Now, the evidence shows that the road as laid out leads into a sparsely settled district along the Missouri river, and does not connect at its western terminus with any highway then traveled to any considerable extent. It is also made to appear that the proposed work as laid out by an engineer would cost at the contract price about \$6,000, and there was evidence tending to show that such price was grossly exorbitant; also that of the work done from two-thirds to three-fourths was done by Supervisor Hilliard. The district court found that

its co-defendant Ogden, treasurer, the county alleges that prior to the commencement of this action a resolution was adopted by its present board of supervisors declaring the invalidity of said contract, and directing said Ogden, as county treasurer, not to pay the said warrant so issued for the sum of \$1,500, and that a copy of said resolution was duly served upon him, said Ogden. It is then alleged that, notwithstanding such direction and order, and since the commencement of this action, said Ogden has paid said warrant in full. The prayer is that said warrant be adjudged to have been illegally issued, and that the same in the hands of the said Ogden be canceled, and held for naught. The relief thus prayed was granted by the decree of the district court. In this, we think, there was error. The contract was made with Roden, and the warrant was issued to him. He was not made a party to this action, and it was not competent for the court to determine upon the validity of the contract or warrant in his absence. Ogden was not legally restrained from making payment of the warrant when presented for that purpose. The direction of the board could not have such effect. That he paid the warrant at his peril, of the controversy then pending concerning the validity of the same, and the resolution of the board asserting the validity thereof, may be true, but it will be time to decide that point when if ever the legality of the action shall have been judicially determined as to the parties in interest.

III. Late in the year 1901, there was said Harrison county, by order of the board what is known in the record as the 11th

8. CONTRACTS
WITH COUN-
TY: validity;
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The transaction cannot be characterized

the contract was entered into with the understanding that the work should be done in the larger part by Hilliard's men and teams, and that to the extent of the work so done by Hilliard the claim of the intervener Smith should be held to be without right, and canceled; that, as the evidence does not disclose just how much work was done by Hilliard, "the court, without passing upon the amount, Smith is entitled to, leaves it to be determined between said contractor and the board of supervisors." In our view, the court could not have done less. The statute forbids members of the board of supervisors from becoming parties, directly or indirectly, to any contract to furnish supplies, materials, or labor to the county. Section 1, chapter 13, Acts Twenty-seventh General Assembly. To our minds the conclusion is irresistible that the contract was crowded through during the closing hours of the official existence of the members of the old board by Hilliard — Pugsley alone voting with him — and for his own benefit. We need not set forth the evidence. It is sufficient that we are satisfied that the finding made by the district court was dictated by the facts, and that the decree entered should not be disturbed.

As to the swamp-land fund warrant, the court found the same to have been issued without authority of law, and ordered the same canceled. We think that in this there was error. Under the act of 1853 (Laws 1852-53,

4. SWAMP LAND:
use of pro-
ceeds;
statutes.

page 29, chapter 13) all swamp lands granted to the State by the act of Congress approved September 28, 1850 (9 Stat. 519, chapter 84), were in truth granted to the respective counties in which situated for the purpose of constructing the necessary levees and drains required by the act of Congress; the balance, if any, to be applied to the building of roads and bridges, when necessary, through or across said lands, and, if not needed for this purpose, to be expended in building roads and bridges within the county. By a subsequent act passed in 1858 (Laws 1858, page 256, chapter 132), entitled "An act to authorize coun-

ties to use the swamp lands to aid in the construction of railroads and seminary buildings," it was made lawful to devote such lands or the proceeds thereof to the erection of public educational buildings, the building of bridges and roads, or for making railroads through the county; provided that the question of such use be first submitted to a vote of the people of the county. If such provision as related to bridges and roads should be given force in view of the title to the act, it is clear to our minds that it had reference only to bridges and roads in the portions of the county apart from the swamp-land districts. No attempt was made to repeal the provisions of the act of 1853, and we are not warranted in holding that there was an implied repeal. The lands upon and over which the road in question was laid out were within the grants referred to, and we think it was within the power of the board to appropriate the proceeds of swamp-land sales to the building of such road without first submitting the question to a vote of the people.

IV. In January, 1901, the board of supervisors of the defendant county entered into a contract with one G. W. Weatherly to fill a ditch and build an embankment in and across what is known as the "Cox Ditch" in a public highway in said county. The work was to be done by taking earth from the highway, or, if not sufficient, from the adjacent land, and the contract price was 10 cents per yard for taking up the earth and 10 cents per yard for dumping it into the ditch. The court below found the contract to be strongly impregnated with fraud, and such finding is in accord with our conclusions. Weatherly, and no one else, was notified by Hilliard that a contract was about to be let. He came before the board with a contract ready for signature, and it was signed. The price therein agreed to be paid was exorbitant. Weatherly then took Hilliard into partnership with him, and the latter not only did most of the work, but he approved of the bills for doing the same. The transaction cannot be characterized

5. CONTRACT WITH
COUNTY:
fraud.

otherwise than as a bold and conscienceless scheme on the part of Hilliard to plunder the county treasury, using Weatherly as a thin cover for his depredation. The court, however, in view of the fact that the work done was of benefit to the county, and in character such as might be charged to the bridge fund, concluded to allow the reasonable value of the work done and the value of extras claimed. Accordingly the price per yard was scaled to five-eighths of the contract price, and the warrants issued and unpaid, including several held by the intervener Burke, were ordered reduced accordingly. The county does not appeal, and the decree should not be disturbed.

V. During the years in question a large number of warrants on the bridge fund of the defendant county were drawn in favor of J. O. Pugsley and C. H. Hilliard, then

members of the board of supervisors of said
6. SAME. county, and these were so drawn upon bills pre-

sented from time to time by said Pugsley and Hilliard, respectively, and approved by the board. Each of the warrants so drawn and now outstanding are owned by the intervener Burke. It is conceded that many of the bills so presented, and for which warrants were so drawn, included charges for labor done and materials furnished by said supervisors respectively upon bridge work in said county. The defendant county insists that to the extent that such warrants represent charges in favor of Pugsley and Hilliard, and hence objectionable under the provisions of the act of the Twenty-Seventh General Assembly, *supra*, the same should be canceled. The contention of intervener Burke is that the record does not show that any such work done or materials furnished was under a contract directly or indirectly made with the county, and hence the statute invoked has no application; moreover, that in view of the character of the work done and materials furnished and the circumstances thereof, the transactions cannot be said to be offensive to the public policy of the State.

The court by its decree ordered a large number of such warrants to be canceled or reduced, specifying the numbers and the amounts thereof. We think there was no error. True, express contracts under which materials were furnished or labor done are not shown by the record. What was done by Pugsley and Hilliard was on their own motion, and the county was liable therefor, if at all, as under implied contracts. Now, the provision of the statute is that "members of the board * * * shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to the county," etc. Surely the language here used is not subject to misunderstanding. A supervisor may not sell material or labor to the county; he may not in any manner become a party to any contract (and this includes implied as well as express contracts) to furnish labor or material to the county. We may agree with counsel for appellants that the enforcement of this law may at times work inconvenience, but with that we have nothing to do. Now, that what was done by Pugsley and Hilliard, as complained of, came within the prohibition of the statute, is too clear for argument; and as, in effect, they are before the court in the person of Burke, asking that they be paid, it became the duty of the court to refuse payment, and this was done by ordering the warrants reduced or canceled. A contract prohibited by statute is void. *Pike v. King*, 16 Iowa, 49; *Miller v. Ammon*, 145 U. S. 421 (12 Sup. Ct. 884, 36 L. Ed. 759). The case is to be distinguished from *Kagy v. School District*, 117 Iowa, 694, at least in that there the action was to recover back moneys paid by the district on accounts fully settled and closed.

VI. The evidence makes it appear that late in the year 1901 lumber and piling in large quantities was purchased of Spooner & Son on behalf of the defendant county.

Such purchases were made by Supervisor Pugsley, who was to retire from office in January following. The lumber and piling were for bridge purposes,

7. SAME.

and was greatly in excess of any possible need of the county. This is shown by the fact that when Pugsley retired from office there was on hand in the district from which he was elected about 126,000 feet of lumber and 10,400 feet of piling; while in the county as a whole there was on hand 310,000 feet of lumber and 17,800 linear feet of piling. And the county bridge fund was overdrawn in an amount exceeding \$60,000. Spooner & Son ordered the lumber and piling in car lots, and upon receipt it was thus delivered to the county, and a bill, without being itemized, was made out and given to Pugsley. The latter presented such bills to the board, and on his recommendation they were allowed, and warrants ordered. The profits to Spooner & Son on piling were over seventy-nine per cent., and on lumber over thirty per cent. We need not set forth the evidence further in detail. The court found there was fraud and collusion, and we agree in the conclusion reached. By the decree the court found that, as the material was in the possession of the county, and could not be returned in entirety, equity would be satisfied by a reduction of the amount of the warrants issued, all of which are now in the hands of the intervener Burke as owner, to the amount of the cost price of the material, with a reasonable profit added, and it was so ordered. The county does not appeal, and we decline to interfere with the decree.

VII. The prayer on the part of interveners that the defendant county be restrained from issuing bonds to fund the legitimate indebtedness of the county was denied by the decree, and of this we approve.

Other matters presented by the record, and reference to which is made in the decree, do not demand specific notice. The decree will be modified in the respects indicated in this opinion, and in all other respects it is affirmed.

Modified and affirmed.

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| 137 | 385 |

G. W. BYERLY, Appellee, v. A. H. SHERMAN and C. W. BREED, EXECUTOR, ET AL., Appellants.

Wills: DEVISE IN LIEU OF DOWER: ELECTION: ESTOPPEL. Under the

- 1 Code of 1873, the one-third interest of a widow in the real estate of her husband was not affected by his will giving her a life estate in lieu of dower, unless she consented thereto by an election entered of record within six months after notice to her by interested parties of the provisions of the will; nor would the management of the entire estate and receipt of rents and profits during her natural life work an estoppel.

Estates of decedents: SALE OF UNDIVIDED INTEREST. The unassigned

- 2 distributive share of an heir in the undivided interest of his intestate in real property may be levied upon.

Deeds: PAROL EVIDENCE OF TRUST. A deed reciting a consideration

- 3 cannot be shown by parol to be a trust.

Appeal from Jones District Court.—HON. J. H. PRESTON, Judge.

THURSDAY, JANUARY 19, 1905.

SUIT for partition of certain real estate. Plaintiff claims to be the owner of an undivided one-thirtieth interest in and to 320 acres of land acquired through a sheriff's and a quitclaim deed. Defendants deny plaintiff's ownership of any part of the property. The trial court made partition in accordance with plaintiff's claims, and defendants appeal.—*Affirmed.*

Janison & Smyth, for appellants.

Remley & Remley and *F. O. Ellison*, for appellee.

DEEMER, J.—Matthew Porter, the original owner of the land, died testate January 3, 1895, seized of the property

in dispute. By the terms of the will he devised to his widow a life estate in his entire property in lieu of dower, and at her death his executors, defendants herein, were authorized and directed to sell the real estate and distribute the proceeds among his heirs in certain proportions. Shortly after the death of Porter, his widow left the land where she and her husband had resided, and thereafter boarded until her death in August, 1901. The executors appointed in Matthew Porter's will filed no inventory of the property, but one of them (Breed, a son-in-law) took charge of the premises in controversy, collected the rents, and looked after the place generally. Out of the proceeds received he paid a note of \$700, with interest, given by the testator, Matthew Porter. After the death of Mrs. Porter the other executor took rent money, and paid it on a note, which had been jointly executed by him and Mrs. Porter before his (Porter's) death. As this note was given for money borrowed for Marion Porter, a son, he (Marion), after the payment thereof, executed a note to the executors for the amount thereof. At the time of the senior Porter's death there were ten children, or the survivors thereof, then in being; among them being C. F. Porter. Plaintiff held a judgment against C. F. Porter. He sued out an execution thereon, and levied upon C. F. Porter's interest in the land. This interest was sold thereunder, and went to sheriff's deed October 22, 1902. In February of the year 1902 C. F. Porter deeded all his interest in the land to one Lawrence, and Lawrence, in January of the year 1903, in turn conveyed the same to plaintiff. These deed were quit-claims. Plaintiff claims that the widow took an undivided one-third interest in the land in fee simple, and that the other two-thirds descended or passed by devise to the children or their representatives, and that he is the owner of C. F. Porter's interest in the widow's share in virtue of the sheriff's deed and the conveyances above referred to; while defendants say that Maria Porter took a life estate under the will of her husband, and that she and her representatives or successors

are estopped from claiming any other or greater estate in her.

Reduced to its last analysis, the claim of plaintiff is that the widow took one-third in fee, and that he is entitled to the interest which C. F. Porter inherited from his mother of this one-third, or one-thirtieth of the land.

1. DEVISE IN LIEU OF DOWER: election; estoppel. The primary question in the case is, what interest did Maria Porter acquire in the lands of her deceased husband? If she took but a life interest, then plaintiff is not entitled to recover. If, on the other hand, she was entitled to a distributive share as survivor of her husband, then plaintiff's cause of action is well founded. Under the law as it existed at the time of Mr. Porter's death the widow's share (one-third in value of the real estate) could not be affected by any will of her husband, unless she consented thereto within six months after notice to her of the provisions thereof by the other parties interested in the estate, "which consent," the statute provides, "shall be entered on the proper records of the circuit [district] court." Code 1873, section 2452. It is conceded by all parties that no formal notice was ever given the widow by the parties in interest, or by any one else, of the provisions of the will, and that no consent thereto was ever entered upon the court records. This being true, there was no statutory election to take under the will, and her distributive share was not affected thereby. *Bailey v. Hughes*, 115 Iowa, 304, and cases cited; *Howard v. Watson*, 76 Iowa, 229. That the widow had verbal notice of the contents of the will, and seemed to be satisfied therewith, is of no moment, in so far as the question of statutory election is concerned. Under the law as it existed at the time of her husband's death, which, of course, must control here, an affirmative act on the widow's part was necessary in order to deprive her of her distributive share. And this affirmative act was required to be evidenced in a stated manner. See cases cited and *Houston v. Lane*, 62 Iowa, 291.

But defendants contend that through the receipt of the rents of the land, and various other matters to which we shall presently refer, the widow, and all persons claiming by, through, or under her, are estopped from saying that she did not take a life estate under the will. This, to our minds, presents the only debatable question in the case. The will gave the widow a life estate upon condition that she should take the same in lieu of dower. After the death of the husband, the executors, or one of them, took charge of the property as agent for the widow, and not as executor. They did not take charge of it as representatives of the husband until after the death of the widow. Matthew Porter left little or no property not exempt from execution. The rents of the property were collected by the widow's agent down to the time of her death, and were disposed of according to her directions, part in payment of the debts of her husband, and part were left in her hands, and were distributed after her death to her heirs. No one, it seems, thought of requiring an election on the widow's part, and no one gave her notice of the terms of the will. She did not, as we have seen, make a statutory election; and, if there is any election, it must be bottomed on the theory of estoppel.

Counsel have diligently gone over our cases for a decision on this point, and it is contended on the one side that there cannot be an estoppel on the widow, save by following the statute; while on the other the theory of equitable estoppel as applied to wills in general is invoked. But for the statutory provision with reference to election, there would be no difficulty with the case; and there are some chance expressions in our cases which seem to indicate that there may be an estoppel or an election through conduct not evidenced by any court record. But in each and every one of these cases, which were decided under the statute now under consideration, there was some record of an election, which was made the basis for the decision. We shall not attempt to review the cases to demonstrate this proposition. Suffice it to

say that all the later decisions proceed upon the theory that there can be no election save as pointed out by statute. In construing this statute in *Howard v. Watson*, 76 Iowa, 229, we said: "The thought is that, if no person interested in the estate as heirs or otherwise object, or cause the widow to be served with the required notice, she is not bound to make any election, but may enjoy what has been devised to her. She has six months after notice in which to make an election, and not six months after she has knowledge of the provisions of the will. She can remain passive until such notice is given." In *Baldozier v. Haynes*, 57 Iowa, 683, we held, in effect, that no one has the right to rely upon any acts or conduct of the surviving husband or wife not made of record in the manner required by law; that it was not the declarations or conduct of the survivor which estopped him, but the entry of record. The object and purposes of the statute were there considered, and the thought expressed that the Legislature undoubtedly intended a strict construction thereof, in order to afford certainty and security to titles. This case was also followed in *Bailey v. Hughes*, 115 Iowa, 304, and the reasons for the rule again stated. See, also, *Whited v. Pearson*, 87 Iowa, 513; *Houston v. Lane*, 62 Iowa, 291. In *Bailey's Case* most of the authorities relied upon by appellant are referred to and analyzed. In the *Whited Case* it is said that there must be something of record upon which to base the conclusion of an election. *Houston Case, supra*, is a strong one, and the decision is planted squarely upon the thought that the survivor's distributive share cannot be defeated by any conduct on his part short of some record entry of consent. There are many reasons for these holdings, which are fully set forth in the opinions cited. The rule has often been challenged, but never departed from, as we understand the cases. If there be any apparent conflict, it is not in what is actually decided upon the facts, but in expressions used in argument, which were not necessary

to the decision of the case, or because the statute was not under consideration.

Appellants argue with much plausibility and force that the survivor cannot have both, and that, if he takes the one he waives the other. This was a matter for the consideration of the Legislature, and the matter has now apparently been covered by the provisions of the Code of 1897. See sections 3270, 3376. Under previous statutes the widow took one-third absolutely. In order to defeat her thereof it was necessary to follow the statute we have quoted. She was not defeated of this interest, except that the statute be followed. This was not done in this case, and the widow was never called upon by any one to make an election. It does not appear that she knew she had to elect, or that any one was complaining of her collection of the rents. She was never called upon by any one to say what she would do. And, as said in the *Howard Case, supra*, she was not bound to make any election, but might enjoy what was devised to her until served with notice to elect. The statute has made a rule for such cases, and we must follow that rule, even if in some cases it may appear to work a hardship. In all matters relating to real estate it is quite important that all transactions affecting the title be of record, so as to give notice to the entire world. Oral testimony against people whose lips are sealed by death is too insecure a foundation upon which to rest titles to land. Undoubtedly this was the reason for the enactment of the provision now under consideration. Any one interested had the right to compel a statutory election, and, if they did not see fit to do so, they should not be permitted to plead an election in some other manner. In none of the cases cited by appellants' counsel from other jurisdictions was there a statute like ours; hence these cases are of no consequence.

It is further argued that, as a widow's unassigned dower cannot be levied upon and sold under execution, plaintiff took nothing under his sheriff's deed. To this there are

two answers: First, Plaintiff did not attempt to levy upon an unassigned right of dower, but upon the interest of an heir of a deceased widow, who owned an undivided one-third interest in the lands at the time of her death. True, this was a distributive share, and had not been assigned at the time of her death, but her fee title passed to her heirs upon her death intestate.

Second. Plaintiff holds a quitclaim to the land of C. F. Porter's interest therein. True, an attack is made upon this deed, but the evidence is not sufficient to set it aside.

The deeds under which plaintiff claims recite considerations as paid, and they cannot be shown by parol to be in trust. These propositions are elementary, and need not be fortified by authority.

It should be remembered that there is no competent evidence in this record that the widow ever had notice of the terms of her husband's will, no evidence as to when, if ever, she saw it, and no claim that any notice was ever given her as provided by the quoted statute. For these reasons there was no such an election as to bar the widow of her one-third in fee of her husband's land. She died owning this one-third, of which C. F. Porter acquired one-tenth. This one-tenth of one-third is now owned by the plaintiff, and the decree confirming his title thereto is *affirmed*.

HOBSON BROS., Appellants, v. JOSEPH H. TOWNSEND, ET AL.

Mechanic's Liens: ESSENTIALS: FURNISHING MATERIAL. For a materialman to avail himself of the subcontractor's lien, he must have actually furnished the material for the particular building upon which the lien is claimed, independent of representations of the contractor; but it is not essential that the materials furnished were actually used in the building.

Appeal from Monroe District Court.—HON. ROBT. SLOAN, Judge.

TUESDAY, FEBRUARY 7, 1905.

ACTION to foreclose mechanic's lien. There was a judgment against the contractor for the amount claimed, but the petition as against the owners was dismissed. The plaintiffs appeal.—*Affirmed.*

J. F. Abegglen, for appellants.

Clarkson & Bates, for appellees.

LADD, J.—The contract for the erection of the house was entered into May 25, 1901. The house was completed June 28th, and accepted by the owner on the following day. The balance due the contractor was paid July 6th. A mechanic's lien was filed by plaintiffs, who furnished materials to the contractor, August 15th. It will be observed that this was more than 30 days subsequent to the completion of the house, and the evidence fails to show that the owner had or was charged with notice of the nonpayment of the materialmen by the contractor. The contention is that, notwithstanding the house was completed as stated, the plaintiffs furnished the contractor lumber on the 16th day of July, which he represented was for this particular house, and therefore that the 30 days from furnishing the last item, within which the subcontractor must serve written notice on the owner, had not elapsed. See section 3093, Code. Whatever the contractor may have represented, the lumber sold him on July 16th was not furnished for this building. The statute provides that "every person who shall * * * furnish any materials * * * for any building" is entitled to a lien. Section 3089, Code. Two things are essential before one may avail himself of the benefits of this statute: (1) Materials must be furnished; and (2) for the particular building. It is not necessary that they be actually used in the building. *Frudden Lumber Co. v. Kinnan*, 117

Iowa, 93; *Lee v. Hoyt*, 101 Iowa, 101; *Neilson, Benton & O'Donnell v. Iowa E. N. Co.*, 51 Iowa, 184. It is necessary that they be actually furnished for that purpose. What the materialman supposes is not controlling. Nor is the owner entirely at the mercy of the contractor. If the latter, through deception, obtains material ostensibly for one building, when it is in fact for another, the owner of the former is not liable, for that it was not furnished for his building. While the materialman may have supposed that the object, it was not such in fact. In other words, the onus is upon the subcontractor, before he can avail himself of the benefits of this statute, to show that the goods sold were actually for the improvement against which the lien is claimed. If for some other, the subcontractor, rather than the owner of the improvement, being made without fault, should suffer the loss, if any. There is no ground for charging the owner with the consequences of fraud perpetrated by the contractor on the materialman. The rule is well settled that, where one of two innocent persons must bear a loss, the one least at fault is shielded, and the burden cast upon the other. Here the owner had no connection with the transaction. The house had been completed, and was occupied by a tenant. He did not have the slightest reason to anticipate that anything more would be purchased for it by the contractor, while slight inquiry by plaintiffs would have elicited the information that nothing more was required. The subcontractors, not the owner, suffered themselves to be deceived; and, as this was without fault of the owner, they, and not he, should suffer the loss. There is nothing in appellants' suggestion that the point decided was not raised by the answer. The petition alleged that the materials itemized were furnished for defendants' building. The general denial put this in issue. Because of failure to prove the allegation upon which prayer for recovery was predicated, relief was properly denied.— *Affirmed*.

JAMES K. OLDS, Appellee, v. ELIZABETH P. FORRESTER and
A. D. FORRESTER, Appellants.

Judgment for costs: DISCHARGE IN BANKRUPTCY. A judgment for
1 costs in a criminal case is not a debt "due for taxes" within
the exception of the bankruptcy law of 1898 and is satisfied
by the discharge of the judgment debtor in bankruptcy.

Same. A judgment for costs in a criminal case is not a debt based
2 on fraud so as to prevent its release by discharge of the debtor
in bankruptcy.

Same. The costs in a criminal prosecution are not part of the fine
3 imposed as a punishment for the offense, and a release of the
costs by discharge in bankruptcy is not contrary to public
policy because interfering with the administration of the criminal law.

Appeal from Dallas District Court.—HON. EDMUND
NICHOLS, Judge.

TUESDAY, FEBRUARY 7, 1905.

THE opinion states the case.—*Affirmed.*

J. M. Goodson and D. H. Miller, for appellants.

White & Clark and H. A. Hoyt, for appellee.

WEAVER, J.—Plaintiff and defendants entered into a written contract by the terms of which plaintiff agreed to sell and the defendants to purchase certain real estate held in the name of the former. Defendants thereafter refused to accept the conveyance or to pay the agreed purchase price, and plaintiff instituted this proceeding to enforce specific performance of the contract. The district court granted the relief prayed for, and the defendants appeal. Specific performance is resisted because of an alleged outstanding judg-

ment lien on the property which is the subject of the contract. Whether such lien exists is the question presented. It appears that on April 27, 1896, in the district court of Dallas county, the plaintiff in this proceeding was convicted of the crime of forgery, and judgment was entered that he be committed to the penitentiary for a specified term and pay the costs of prosecution taxed at about \$800. Thereafter said plaintiff was duly adjudged a bankrupt, and on March 20, 1900, obtained a discharge from all debts and claims provable in such proceedings. Did such discharge relieve the plaintiff from the indebtedness represented by the aforesaid judgment for costs? This proposition is affirmed by the appellee and denied by the appellants.

The appellants' contention that the lien still exists is sought to be sustained upon three several grounds as follows:

I. It is first argued that the judgment is a debt due to the State of Iowa, and as such is expressly excepted from the effect of the bankrupt's discharge. The provision of the bankruptcy act of 1898 on which this contention is based is as follows: "Sec. 17. A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (1) are due as taxes levied by the United States, the State, county, district or municipality in which he resides," etc. Bankruptcy Act July 1, 1898, chapter 541, 30 Stat. 550 [U. S. Comp. St. 1901, page 3428]. It needs but a reading of this language to demonstrate that it is not open to the construction sought to be placed upon it. The debt represented by the judgment against the appellee is in no proper sense of the word "due as taxes," and therefore does not come within the express terms of the statute. Neither is there any room for including it by implication. Were there no reference in the statute to claims due to the United States or to the State, we might, perhaps, be at liberty to assume that the discharge of the bankrupt was not intended to affect his liability for the payment of such debts. But the statute is not silent in

1. JUDGMENT FOR
costs: dis-
charge in
bankruptcy.

this respect. It does expressly withhold from its operation all debts due to the sovereign "as taxes," and under the familiar rule *expressio unius exclusio alterius* it must be held that as to other matters of civil liability for the payment of money the State has no advantage or preference over the individual citizen in the enforcement of its claims against one who has been discharged as a bankrupt. This holding is in clear accord with *United States v. Herron*, 20 Wall. 251 (22 L. Ed. 275), cited by the appellants. It was there held that "a discharge will not release the debtor from a debt due the sovereign unless the sovereign is expressly named in the clauses relating to the discharge of debts." The present statute was enacted since that decision was rendered, and as "the sovereign is there expressly named" and the debts reserved from the operation of the law are there expressly enumerated we must assume that all other debts are provable in the bankruptcy proceedings. •

II. It is next said that the judgment represents a debt based upon the fraud of the appellee, and is therefore not released by the discharge in bankruptcy. The point is not well taken. The amount of the judgment

2. SAME.

is made up of items of fees due to the officers of the court and to witnesses used upon the trial of the criminal case against the appellee. It would require a palpable distortion of the meaning of words to hold that these incidental expenses of a judicial proceeding are debts originating in the fraud of the appellee. The crime for which he was being tried may have involved the element of fraud, but the taint of such fraud is not transmitted to the costs which were regularly and properly made by the State and by the accused in the course of the trial. If the case before us involved consideration of a judgment for damages recovered by the person injured by the appellee's fraud, we should have a very different question to consider.

III. It is finally insisted that to make the discharge effectual against the judgment is to interfere with the due

course of justice in criminal proceedings, and is therefore against good morals and public policy. If it

3. SAME.

were true that to uphold the claim of the appellee is to enable the bankruptcy court to cancel and set aside penalties which the courts have adjudged against persons found guilty of crime, the objection raised by the appellants would have much force. If the appellee had been convicted of some offense punishable by fine, and adjudged to pay a fine of \$800, it would be an intolerable condition if he could immediately be discharged from such liability by a proceeding in bankruptcy. See *Moore's Case* (D. C.), 111 Fed. Rep. 145. But a fine is not, strictly speaking, a debt due from the person against whom it is assessed. The judgment is not entered against him because he owes the State so much money. His obligation to pay is not a debt obligation. He is adjudged to pay a certain sum of money as a punishment for a public offense, and his obligation to suffer that punishment cannot be discharged except by performance, or by the interposition of executive clemency. But the same is not true as to costs accruing in the prosecution which results in the fine. They are no part of the penalty. They are not assessed against the accused as a punishment, but rather in pursuance of the general policy by which the losing party in judicial proceedings is required to pay all taxable costs. This we have expressly held to be the law. *Albertson v. Kriechbaum*, 65 Iowa, 17. While in form the judgment for costs is in favor of the State, its interest is nominal only, the real parties in interest being the officers and witnesses to whom the fees are due. That the obligation of such judgment is civil, and not penal, is further recognized in our former holdings that the general power vested in the Governor of the State to pardon public offenses and to remit fines and forfeitures does not extend to the remission of costs accruing in the prosecution of crimes and misdemeanors. *State v. Beebee*, 87 Iowa, 639; *Estep v. Lacy*, 35 Iowa, 419.

For these several reasons stated we are satisfied with the conclusion reached by the trial court, and the decree appealed from is therefore *affirmed*.

CLARK BROS., Appellant, v. ROBERT FORD and MARY FORD.

Fraudulent conveyances: DEED FROM HUSBAND TO WIFE. The agreement between a husband and his wife's parents to reimburse her to the extent of funds advanced him for family use by the parents, will support a conveyance of property from the husband to the wife in payment thereof, irrespective of any contract between them, or the husband's insolvency.

Fraud: BURDEN OF PROOF. To set aside a conveyance from husband to wife as fraudulent as to creditors, the plaintiff has the burden of showing fraud.

Appeal from Monroe District Court.—HON. M. A. ROBERTS, Judge.

TUESDAY, FEBRUARY 7, 1905.

ACTION by plaintiffs, as judgment creditors of Robert Ford, to have a conveyance of property to his wife set aside, and to subject such property to the satisfaction of their judgments. Decree for defendants. Plaintiffs appeal.—*Affirmed*.

Clarkson & Bates, for appellants.

Fred D. Everett and *N. E. Kendall*, for appellees.

McCLAIN, J.—The indebtedness on which plaintiffs' judgments were recovered antedated the conveyance of the property by Robert Ford to his wife, and the occupancy of such property as a homestead; and the sole question for us is whether the conveyance was voluntary, or was made and accepted with the intent to defraud creditors. There is no

126 460
130 285

126 460
134 372

126 460
135 68

reasonable doubt that, at the time of the conveyance, Ford was insolvent. The evidence relied upon by defendants as tending to show that the conveyance was not voluntary and without consideration is found in their testimony, which is to some extent corroborated by relatives, that the conveyance was made in fulfillment of a promise by Ford to his wife's father at the time her father gave money and property to the daughter and her husband, that Ford would, as we infer from the testimony, reimburse his wife for the money and property thus given by the father and a subsequent promise to his wife's mother at the time that other advancements were made that the wife should be likewise thus secured or reimbursed for such advancements. The argument for appellants is that as the property and money thus advanced by the wife's parents was used for the support of the family, without any direct promise from the husband to the wife that she should be paid, the transaction did not give rise to any indebtedness as between husband and wife. But if the husband promised, for a consideration proceeding from his wife's parents, that he would reimburse the wife to the extent that money and property were advanced to him, even for family use, then the wife, as the party for whose benefit the promise was made, had a valid claim against her husband to that extent, regardless of any contract between the two for such payment. We think that by preponderance of testimony it was shown that such promises of reimbursement were made to the extent of the value of the property conveyed, less the incumbrance subject to which the wife accepted it, and therefore we reach the conclusion that the conveyance should not be set aside as to any extent voluntary or without adequate consideration.

As to the contention that the conveyance was made and accepted with intent to defraud creditors, the burden of proving fraud was on the plaintiffs, and we think they have not made out their case by a preponderance of the evidence. It may be confessed that the circumstances were suspicious, and

yet the husband had a right to pay his debts to his wife, if he saw fit to do so, and, in the absence of a fraudulent purpose, the conveyance must be sustained.

On the whole evidence, we are satisfied that the decree of the trial court was correct, and it is *affirmed*.

STATE OF IOWA, Appellee, v. FRANK HUMBLER, Appellant.

Assault with intent to commit murder: INSANITY: BURDEN OF

1 **PROOF.** In a prosecution for assault with intent to commit murder, the defendant has the burden of proving the defense of insanity to the reasonable satisfaction of the jury, by a preponderance of the evidence.

Insanity: EVIDENCE. The jury is not required to accept as a verity
2 the statements of experts based on hypothetical questions, as to the insanity of a defendant, but may weigh it as other testimony and from all of the evidence on the subject determine the fact.

Appeal from Monroe District Court.—HON. ROBERT SLOAN, Judge.

TUESDAY, FEBRUARY 7, 1905.

DEFENDANT was indicted for the crime of an assault with intent to commit murder. He was convicted of the crime of an assault with intent to commit manslaughter, and from the judgment and sentence imposed appeals.—*Affirmed*.

Woodson & Brown and O. C. G. Phillips, for appellant.

Charles W. Mullan, Attorney-General, and Lawrence De Graff, Assistant Attorney-General, for the State.

DEEMER, J.—That the defendant committed the assault charged is practically conceded. His principal defense to the charge was insanity. The alleged errors relied upon for a reversal we shall take up in their order.

It is contended that the court erred in overruling defendant's challenge to a juror named Taunton. The case in this respect falls clearly within the rule announced in *State v. Munchrath*, 78 Iowa, 268, and other like cases. Indeed, the showing of prejudice is not so strong here as in those cases.

II. Next it is insisted that the trial court erred in its instructions regarding the testimony introduced to show insanity. The instructions complained of read as follows:

1. **INSANITY:**
burden of
proof. "It is not necessary, in order to acquit, that the evidence on the subject of insanity should satisfy you beyond a reasonable doubt that the defendant was insane. It is sufficient if, upon a full consideration of all the evidence in the case, and all the facts and circumstances therein, that you are reasonably satisfied thereof * * * The burden of proof is upon the defendant to show that when the defendant shot at his wife, if he did so, he was insane, and that his act in so doing was the direct result thereof; and he must establish the same to your reasonable satisfaction by a preponderance of the evidence in the case. But if the defendant has established the same by the weight or preponderance of the evidence, then it raises a reasonable doubt of the defendant's guilt, and entitles him to an acquittal; otherwise it will not entitle him to an acquittal." These instructions, while not in accord with the law in some other jurisdictions, have full support in our cases. *State v. Felter*, 32 Iowa, 49; *State v. Bruce*, 48 Iowa, 530; *State v. Novak*, 109 Iowa, 717; *State v. Robbins*, 109 Iowa, 651; *State v. Wright*, 112 Iowa, 436; *State v. Thiele*, 119 Iowa, 659.

III. Lastly, it is argued that the verdict is against the testimony, in that defendant's insanity was clearly shown, and practically undenied. True, there was considerable expert testimony tending to show defendant's insanity, but these experts gave their opinions upon hypothetical questions, which assumed a state of facts

2. **INSANITY:**
evidence.

most favorable to the defendant's theory. The jury may not have found all these assumptions correct, or it may have believed that certain other facts shown by the State should be considered as bearing upon this issue. At any rate, it was not bound to take this expert evidence as conclusive. It had the right to weigh this testimony the same as any other, and to give credit where it thought it was due. The State introduced testimony tending to show a motive for the assault, and also produced evidence as to the conduct of the defendant, from which the jury may have concluded that he was sane. Moreover, defendant was a witness on his own behalf, and thus submitted himself as an exhibit as to his mental condition. The whole matter was for the jury, and with its finding we have no disposition to interfere.

There is no error in the record, and the judgment is *affirmed*.

WOOD & DUVALL, Appellees, v. IOWA BUILDING & LOAN
ASSOCIATION, Appellant.

Contract of employment: BREACH: REMEDY. A contract of employment for personal services to be performed in the future, is not the subject for an action for specific performance, but the remedy in case of breach is a law action for damages.

Contract of employment: TERMINATION BY LEGISLATIVE ENACTMENT.

2 A contract for personal services entered into with a building and loan association providing for compensation from a specified fund, and which contemplates a possible change in the law rendering the creation of such a fund and payment of services therefrom illegal, is terminated by a subsequent legislative act to that effect, thus rendering performance impossible.

Appeal from Polk District Court.—HON. S. F. PROUTY and
HON. W. H. MCHENRY, Judges.

TUESDAY, FEBRUARY 7, 1905.

ACTION in equity to enforce the provisions of a written contract, for an accounting, etc. Plaintiffs are copartners, and the defendant, as its name implies, is a building and loan association organized and incorporated under the laws of this State. The contract in question was entered into in September, 1897. Therein plaintiffs agreed that for the period beginning on the date named and ending January 1, 1903, they would engage exclusively in the sale of the capital stock of said association, and in connection therewith appoint, take charge of, and direct the entire agency force engaged in the procurement of subscriptions to such capital stock. Further, that they would have no interest adverse to the association, but would use all efforts to build up and promote the best interests thereof. It was then provided that in consideration for such services the association agreed to pay fifty per cent. of the gross expense fund received on business done from and after the date of the contract and while the plaintiff firm was actively employed under said contract, and fifty per cent of the receipts to the expense fund on all such business for five years after the expiration or termination of the contract; also all membership fees collected on stock sold by plaintiffs or their agents, and a fixed sum named on all full-paid or prepaid stock sold by them. Quarterly settlements are stipulated for, and to that end the books, records, etc., of the association are to be open to inspection. It was then provided that the association retained the right to change its articles of incorporation, by-laws, and method of doing business whenever the laws of the State or the rules or requirements of the State Auditor or other supervising officer of the State may require, or whenever its board of directors may deem expedient; and to all such changes the plaintiff firm agreed, upon notice, to conform, anything in the contract to the contrary notwithstanding.

Plaintiffs allege that they entered upon the performance of said contract, and continued therein until July 1, 1900, when defendant refused to longer recognize or be

bound by said contract, and discharged plaintiffs from its employ, and has refused and still refuses to make quarterly account of the amounts due plaintiffs. A decree is prayed for directing defendant to allow plaintiffs to proceed under the contract, that an account be taken of the amount which has accrued and become due since July 1, 1900, and for such order with respect to all accounts yet to mature as may be equitable.

The answer alleges that under the provisions of the articles of incorporation and by-laws of the defendant association in force at the time of the execution of the contract sued upon an expense fund was provided for, out of which all expenses of the association were to be paid; that such is the fund referred to in said contract. The provisions so pleaded are as follows: The expense fund "shall consist of ten cents per share deducted from each monthly payment in Division A stock, and six cents per share deducted from each monthly payment in Division C stock, but shall not exceed eight dollars for the maturing of a single share of installment stock. There shall also be paid into the expense fund, from the profits, two dollars per year for each share of deposit or prepaid stock." The answer then alleges the enactment of chapter 69, page 51, Acts Twenty-eighth General Assembly, which took effect May 3, 1900, and the amendment of its articles of incorporation and by-laws to conform thereto; that from the time thereof it has had no expense fund, nor any receipts thereto. The defendant pleads that accordingly the further performance of said contract on its part is impossible.

With the answer the defendant presented a counterclaim based upon the allegation that subsequent to July 1, 1900, the members of the plaintiff firm went abroad in the State, and, in violation of the letter and spirit of the contract alleged, misrepresented the financial condition of the defendant association, asserting that it was insolvent, etc., and thereby induced many of its shareholders to withdraw their

interests; that they also procured to be assigned to them much of the outstanding stock of the association, which they presented, and demanded the redemption thereof. Damages in a sum named are claimed. The case came on for trial before Judge Prouty, and was submitted upon the sole question as to the legal rights of the parties under the contract; the affirmative claim for damages pleaded in the answer to be heard and determined at some future date. An interlocutory decree, so denominated, was entered by the court, in which it was found that since July 1, 1900, the defendant had paid its expenses from its profit earnings, and that under the present statute it has the power to use for expenses an annual sum, to be taken from profit sources, equal to two and one-half per cent. of its assets; that plaintiffs were not entitled to recover upon or out of a fixed charge upon stock payments, but that defendant was liable upon the contract in suit in a sum "equal to one and one-fourth per cent. upon so much of its assets as arises out of and is based upon the stock solicited or caused to be sold by plaintiffs under said contract from July 1, 1900, and interlocutory judgment for said amount is hereby rendered in favor of plaintiffs." A reference was ordered, conditioned upon a failure of the parties to agree upon the amount plaintiff firm is entitled to recover. From such interlocutory decree the defendant appeals. At a later term said cause came on again before the court, Judge McHenry presiding, and there was then tried the issue under the counterclaim pleaded by the defendant, resulting in a dismissal thereof and judgment against the defendant for costs. From this judgment the defendant appeals.—*Reversed* on first appeal; *Affirmed* on second appeal.

Baily & Stipp, for appellant.

Dale & Harvison, for appellees.

BISHOP, J.—It will be observed that the plaintiff firm

is not seeking a recovery in the way of damages growing out of a breach of the contract alleged. The relief prayed for

1. **CONTRACT OF EMPLOYMENT: breach; remedy.** is in the nature of a demand for specific performance, and, secondarily, for an accounting to ascertain the amount that had become due under the contract, and for judgment. The contract was one for personal services to be rendered. We know of no rule under which future performance of a simple contract of that character can be enjoined or enforced by a decree of court. In all such cases the parties are remitted to a law action for damages. But in view of what is presently to be said this point need not be elaborated upon.

As the plaintiff firm does not claim to have solicited or made sales of any stock since July, 1900, the date of the last settlement, it must be understood that the demand for an accounting is predicated upon that provision of the contract under which plaintiffs were to be paid fifty per cent. of the expense fund arising out of payments on stock sold previous to that date. Proceeding upon this assumption, we have for determination the question whether, in view of the change in the situation dictated by the subsequent act of the Legislature, there remained to plaintiffs any enforceable right under the contract. The statute in force at the time of the making of the contract authorized the creation of an expense fund substantially as provided for in the articles of incorporation and by-laws of the defendant association. That the parties in making their contract had in mind such provisions of the statute, as well as the laws of the association, must be accepted as true, and this to begin with. Now, by a further provision of the statute enacted prior to the organization of the defendant association, and in force at the time of the contract in question, it was provided that such corporations, in common with all others, should at all times be subject to legislative control to the extent that the rights and powers, granted thereto "may be at any time altered,

2. **CONTRACT OF EMPLOYMENT: termination by legislative enactment.**

abridged, or set aside by law, * * * whenever the General Assembly shall deem necessary for the public good." Code, section 1619 (Code 1873, section 1090). With respect to such provision, the presumption authorized by law need not be indulged in. The parties themselves gave recognition thereto, and made their contract to depend as to its terms and the enforceability thereof upon the continuance of the laws then in force, and subject to be affected by any future legislation upon the subject.

Now, the act of the Twenty-Eighth General Assembly in effect worked a repeal of the former statute authorizing the creation of an expense fund. After such act took effect there was no longer any right to levy a fixed charge upon stock or stock payments for such purpose, or otherwise to set apart moneys to be devoted to the payment of expenses, whatever the source from which the same were derived. The provision is simply that "all expenditures and expenses for management and conducting the affairs of said association * * * shall be paid from the receipts of interest, premiums, and other sources of profit." The act provides for a limitation upon the amount which may be thus expended — as applied to the defendant association being two and one-half per cent. on its assets as shown by its last annual report. The defendant amended its articles of incorporation and by-laws to bring the same into conformity with the change thus made in the statute. Consideration of the foregoing must make it manifest that with the taking effect of the amendatory statute it became impossible for the defendant to carry out its contract by making payments conformably to the terms thereof as written. By general acceptance the expression "expense fund" means a fund set apart and dedicated to expense purposes. The defendant no longer has an expense fund which it can divide with plaintiffs, either voluntarily or under stress of judicial decree. True, it is still authorized to meet the current expenses of conducting its business, but this it may do only by drawing upon moneys on hand derived

from profit sources, and in a sum sufficient for that purpose, observing always the limitation prescribed in the statute. We think it must be said that the situation in which the parties find themselves placed is one contemplated by the provisions of their contract. Proceeding upon this assumption, it must also be said that the plaintiff firm is in no position to complain. And this not only because of such provision in the contract, but by virtue of the prevailing doctrine that a change in the law which makes the performance of a contract impossible or illegal operates to release the obligor from his obligation to perform. *Brady v. Insurance Co.*, 11 Mich. 425; *Cordes v. Miller*, 39 Mich. 581 (33 Am. Rep. 430); *Jones v. Judd*, 4 N. Y. 412; *Wharton on Contracts*, sections 297, 305; 9 Cyc. 629.

This must be true, as otherwise relief could be granted only upon the hypothesis that the power is lodged in the court to make a new contract for the parties, and to require of the defendant that, without reference to the amount actually needed by it to pay current expenses, it must draw from profit sources the full sum of two and one-half per cent. on all its assets traceable to payments on stock sold by the plaintiff firm, and make division thereof on a moiety basis. There is no authority that recognizes the existence of such power in the courts. Moreover, as we think, any attempt, however made, to divert the profit fund of the association to the extinguishment of a contract obligation in character as here claimed under the guise of current expense, would be an act in contravention of both the letter and the spirit of the present statute. It follows that the court, as presided over by Judge Prouty, erred in finding that the contract had been breached, and in holding that in view of the extinguishment of the expense fund, compensation could be made by resorting to moneys in the hands of the association derived from profit sources.

Counsel for appellees point out that the moneys sought to be recovered by the plaintiff firm in this action had actually

been earned prior to July, 1900; that nothing remained to be done thereafter but to make quarterly settlements and payments. In view of this it is said that, if the act of the Twenty-Eighth General Assembly is to be given effect as contended for by appellant, the same is violative of the Constitution, in that the result would be, as applied to this case, to impair a fixed contract obligation. In our opinion, the contention is without force. As we have already seen, the right was reserved in the Legislature to change the law at pleasure, and thereunder it might go so far, even, as to legislate such associations out of existence. The parties contracted with such provision as to the right and authority of the Legislature staring them in the face. More than that, they made it a part and parcel of their contract. But, if this were not so, it must be said that the obligation of the defendant to pay was conditioned upon its having a certain fund out of which to make payment. In no event could plaintiffs be heard to assert that they were possessed of a claim ripe for judgment until it had first been made clear that a fund existed out of which, by the terms of their contract, they were entitled to be paid.

II. At a later term of the court the matter involved in the counterclaim pleaded by defendant came on for trial, Judge McHenry presiding. The judgment of dismissal was based upon the insufficiency of the evidence to support the allegations of such counterclaim. We have read the record in full, and we agree that the trial court had no warrant for reaching any other conclusion.

From what we have said it follows that in respect of the first appeal the interlocutory decree must be, and it is reversed; in respect of the second appeal, the judgment dismissing the counterclaim must be, and it is, affirmed.

Reversed on first appeal; affirmed on second appeal.

STATE OF IOWA V. MICHAEL CONROY, Appellant.

Burglary: EVIDENCE. A conviction of burglary will not be reversed
1 because of the admission of incompetent evidence, where objection thereto was waived by silence or otherwise.

Evidence: LETTERS. In proof of conspiracy, it is error to permit
2 the addressee to testify to the contents of a letter claimed to have been written by defendant, on proof simply of the address and signature, there being no other evidence connecting defendant with the letter.

Evidence: POSSESSION OF STOLEN PROPERTY. A defendant charged
3 with burglary should be permitted to explain his declarations concerning his possession of the stolen property, made shortly after he acquired possession and before his accusation.

Appeal from Scott District Court.—HON. JAMES W. BOLLINGER, Judge.

WEDNESDAY, FEBRUARY 8, 1905.

THE defendant was convicted of the crime of burglary, and appeals.—*Reversed.*

Lane & Waterman, for appellant.

Chas. W. Mullan, Attorney-General, and *Lawrence De Graff*, Assistant Attorney-General, for the State.

SHERWIN, C. J.—The burglary in question was committed by one Burrier, a professional. The defendant's guilt, if he be guilty, is and must be based on a general conspiracy to commit the crime charged, in which
1. EVIDENCE. he had a part. On the trial Burrier was permitted, without objection, to testify to similar crimes committed by him before and after the alleged conspiracy was formed. Had there been objections to the testimony relating

to burglaries committed before the conspiracy, and to the testimony relative to other burglaries that were not claimed to have been a part of the general plan, there could be no question as to the inadmissibility of such testimony. But a defendant in a criminal case may waive objections to incompetent testimony, and when he does so, by his silence or otherwise, we will not reverse because it has been admitted. There was some evidence tending to prove that the defendant was actively engaged in the general conspiracy alleged, and, in view of a retrial of the case, we shall not express our opinion as to the sufficiency of the evidence corroborating the State's principal witness, Burrier. There were two rulings on the admission of testimony which were erroneous and prejudicial to the appellant, and on account of which we shall have to reverse the case:

The State relied greatly on the testimony of Burrier to connect the defendant with the general conspiracy charged, and it was therefore necessary to prove the relation existing between the two. It was claimed that the defendant had written a letter to Burrier's mistress which tended to prove such relation and the conspiracy afterwards formed. The letter, except the signature and address, had been destroyed. There was nothing save the purported signature which tended in any way to prove that the letter was written or signed by the defendant, or with his knowledge, and yet the scrap of paper containing the signature and address was put in evidence, and the witness to whom it was claimed the letter was addressed was permitted to testify to its contents. The admission of the evidence was clearly erroneous. *State v. McGinn*, 109 Iowa, 641; *Snyder v. Fidler*, 125 Iowa, 378.

The defendant, after the time when it was claimed that the conspiracy was formed, had in his possession a revolver that was stolen by Burrier in Omaha. Burrier testified that he gave it to the defendant, while the defendant testified that he bought it on the street in Clinton. The defendant was not

permitted to prove his declarations explaining his possession.

3. EVIDENCE: They were made very soon after he acquired possession thereof, and long before he was accused of the crime in question. The declarations should have been admitted. The revolver was stolen by Burrier, and the defendant's possession thereof was proven for the evident purpose of showing the relation existing between them. Furthermore, the State's evidence tended to show that the defendant knew how Burrier obtained the revolver. *State v. Kelly*, 57 Iowa, 644; *Nodle v. Hawthorn*, 107 Iowa, 380.

What we have already said about the letter applies as well to the instruction relative thereto, in which the jury was told that it might consider the contents thereof in determining the guilt or innocence of the defendant.

We find no other serious error in the instructions or in the record, but, for those indicated, the judgment is reversed and the case remanded.— *Reversed*.

THERESA WINKLER, Appellant, v. HAWKES and ACKLEY,
T. J. MAXWELL, and JOHN R. MAXWELL, Appellees.

Appeals: An appeal to the supreme court which is not presented in
1 substantial conformity with the rules governing the same, is not
entitled to consideration.

Admission of evidence: ERROR. Error in refusing to strike an
2 ordinance pleaded as authority to make a post mortem examination, was cured by an instruction that the ordinance gave
no such authority.

Post mortem examination: CONSENT. Consent to a post mortem
3 examination to ascertain the cause of death implies permission
to conduct the examination in the approved manner, including
the removal of organs for microscopic examination where
necessary and proper, unless such permission of removal is
expressly withheld, especially where the parts were duly returned and
replaced for burial.

Appeal from Keokuk Superior Court.—HON. A. L. PARSONS, Judge.

WEDNESDAY, FEBRUARY 8, 1905.

THE opinion states the case.—*Affirmed.*

J. F. Smith, for appellant.

Hughes & Sawyer, for appellees, Hawkes & Ackley.

Hollingsworth & Blood, for appellees, T. J. Maxwell and John R. Maxwell.

WEAVER, J.—The plaintiff alleges that her husband, George Winkler, died at a hospital in the city of Keokuk, and that immediately after his decease the defendants Hawkes & Ackley, with indecent haste, and without any authority therefor, removed the body to their undertaking rooms, in said city, where the defendants T. J. Maxwell and John T. Maxwell, with the assistance of Hawkes & Ackley, wrongfully mutilated said body and removed some of its parts, and that, by reason of such wrongful acts, plaintiff has been made to suffer much physical and mental anguish, for which she asks to recover damages. In answer to the plaintiff's claim, the defendant John R. Maxwell alleges that he is a physician and surgeon, and attended upon Winkler in his last sickness, and that, after the death of Winkler, upon invitation of one Dr. Coulter, who had also been physician to said deceased, and upon information that the widow consented thereto, he assisted said Coulter in a post mortem examination of the body for the purpose of determining, if possible, the cause of death; that said examination was performed in an orderly and scientific manner, and without any unnecessary mutilation or removal of the parts. In all other respects he denies the allegations of the petition. The defendant T. J. Maxwell, pleading separately, sets up substan-

tially the same answer as his codefendant. By an amendment to their answers these defendants also pleaded an ordinance of the city of Keokuk which provides that, upon the death of any person within its jurisdiction, the physician in attendance shall certify to the proper authority the cause of such death. The answer of the defendants Hawkes & Ackley is not disclosed in the abstract. There was a trial to a jury, resulting in a verdict and judgment for the defendants, from which the plaintiff appeals.

I. The appeal is presented in a very unsatisfactory manner, and with little, if any, regard for the requirement of the rules of this court. Notwithstanding the statute,

enacted upon demand of the bar, abolishing
1. **APPEALS.** such practice, counsel's brief is prefaced with

15 pages of assignments of error. Scarcely one of the assignments is so full or complete as to apprise us of the point sought to be made, without going to the abstract. In some instances we are referred to the page of the abstract, and in others the reference is blank; leaving the court to search through one hundred and twelve pages of printed record to find the ruling complained of. This is followed by a statement of points or errors relied upon, in which we are simply directed to the assignments aforesaid by number, and these assignments, in turn, refer us to the abstract for an explanation. The brief of authorities which is appended is little, if any, more direct or certain, and is made intelligible only by tracing its references to the statement of points, thence to the assignments of error, and thence to the abstract. We cannot consent to try appeals in this manner. The rules of the court are neither complicated nor obscure, and we are disposed at all times to construe them liberally in favor of litigants who show substantial compliance with their terms. But we cannot permit them to be ignored. They have been framed and adopted to facilitate business and insure its prompt and orderly disposition — a result in which the profession and those whom it represents are vitally inter-

ested. We indulge in these remarks not only because of the condition of the record before us, but because of a too frequent and increasing tendency of counsel bringing cases to this court to depart from the rules in respect to the preparation of briefs. If lawyers belong to that class of persons to whom, it is proverbially said, a word is sufficient — a proposition which we are pleased to affirm — this hint will be all that is needed to check the tendency referred to.

II. The criticism made of the appellant's brief does not apply with equal force to all the points argued, and we shall pass upon those which we consider to have been properly presented. A reversal is asked because of

2. ADMISSION OF
EVIDENCE:
error.

the ruling of the court refusing to strike out the amendment to defendant's answer pleading the ordinances of the city of Keokuk. We are disposed to think that the motion should have been sustained, but we find from the record that the court instructed the jury that such ordinance gave no authority to the physician to make a post mortem examination of the body, or to remove any part or portion of such body, and, in view of this instruction, we think that the error in permitting the amendment to stand was cured.

III. The court submitted to the jury the question whether the plaintiff consented to the post mortem examination of the body of her husband, and it is argued that there

is no competent evidence upon which such consent could be found. We think otherwise.

3. POST MORTEM
EXAMINATION:
consent.

Indeed, the plaintiff's own testimony clearly shows that she did consent, and that the point of her subsequent objection was that the surgeons took away some of the parts or organs of the body. It fully appears that she understood the purpose of the examination was to ascertain the cause of her husband's death, and that she consented to it for that purpose. That consent being given, we think it must be held to imply a permission to the surgeons to conduct such examination in the approved and usual manner practiced by their profession; and, if the removal of some of

the organs for microscopic examination was necessary or proper to effect the purpose of the post mortem, then the defendants would not be guilty of an actionable wrong in so doing, unless such permission was expressly withheld at the time the consent to open the body was given. It is true that Mrs. Winkler claims she made it a condition of her consent that none of the parts should be taken away, but that question was submitted to the jury, which evidently found against her contention in this respect. Moreover, the condition that none of the parts should be taken away did not necessarily prohibit the taking of such parts to the office of the surgeons for examination, if they were duly returned and replaced for burial, and this appears to have been done. The fact seems to be that the surgeons removed the heart and liver, in whole or in part, from the body, and took them from the undertaker's room for further examination; and, upon hearing that the plaintiff objected thereto, the parts were at once returned and buried with the body. There is no indication that the surgeons acted otherwise than in entire good faith, and we believe their acts in the premises were fairly within the scope of the consent which plaintiff concedes she gave. But however this may be, this feature of the controversy was submitted to the jury under instructions, which were very favorable to the plaintiff, and we are not disposed to interfere with the verdict.

For reasons stated in the first paragraph of this opinion, none of the other matters argued by counsel will be considered.

The judgment of the district court is *affirmed*.

A. J. GLASSBURN, Appellee, v. S. H. WIREMAN, Administrator, ET AL., Defendant. NANCY PALMER, Appellant.

Defective title: NOTICE TO MORTGAGEE. Neither the fact that a mortgagor's title was based on a deed from her husband expressing

a consideration of "love and affection," nor that a judgment was entered against the husband shortly after the conveyance, amounted to notice to the mortgagee of a defective title.

Appeal from Mills District Court.—HON. O. D. WHEELER,
Judge.

WEDNESDAY, FEBRUARY 8, 1905.

ACTION in equity to foreclose a mortgage on real estate. There was a decree in favor of plaintiff, and the defendant Nancy Palmer appeals.—*Affirmed.*

C. E. Dean and *E. B. Woodruff*, for appellant.

Ivory & Otis, for appellee.

BISHOP, J.—The mortgage in suit was executed and delivered to plaintiff on December 13, 1898, by Hannah W. Van Arsdale, and she was at that time the owner of the record title to the property. The defendant Nancy Palmer, upon coming in, pleaded a judgment obtained by her against Garrett Van Arsdale—first in justice's court, and thereafter, and on March 10, 1897, transcribed to the district court of Mills county. Further, she alleged that, subsequent to the time of the debt upon which said judgment was founded had accrued, the said Garrett Van Arsdale became the owner of the property in question, and that on November 25, 1896, he conveyed the same to his wife, Hannah W. Van Arsdale; that such conveyance was voluntary, without consideration, and made and accepted in fraud of said defendant, and to defeat a collection of her said judgment. As to plaintiff, it is alleged that he took his mortgage with full knowledge of all such facts.

The proof made upon the trial was sufficient to show that the conveyance from Garrett Van Arsdale to his wife was without any valuable consideration, and that such property was substantially all that he owned. With this established,

it may be taken for granted, for the purposes of the case, that defendant was entitled to a decree as against the Van Arsdales. In proof of knowledge on the part of plaintiff of the fraud, defendant relies wholly upon the state of the public records of the county, as the same existed at the time of the execution of the mortgage. As already outlined, such records disclosed the deed to Hannah Van Arsdale executed and recorded in November, 1896, the consideration expressed therein being "love and affection"; also the judgment against Garrett Van Arsdale entered in the district court on transcript in March, 1897. In accepting his mortgage, and in the absence of actual notice of defects or infirmities, plaintiff confessedly had the right to rely upon the record title to the property. Now, the mere fact that the record disclosed the character of the conveyance under which his mortgagee held title was not notice of a defect or infirmity; there being no proceedings pending of record or judgments entered against her husband at the time he parted with the title. So, too, the judgment entered against Garrett Van Arsdale more than a year afterwards did not become a record lien on the property, and could only be made so by proper proceedings brought for that purpose. Plaintiff was not bound, therefore, to take notice of such judgment. Moreover, there is nothing in the record before us to show that the judgment entry disclosed anything respecting the origin or date of the claim on which it was rendered. If, therefore, the attention of plaintiff had been in fact called to such entry, he would have known nothing more than that the judgment existed.

As plaintiff had no notice, either actual or constructive, of any right or interest of the defendant Palmer in the property at the time he took his mortgage, it follows that the decree of the court below was warranted, and it is *affirmed*.

LYDIA FOX, Appellee, v. THE WATERLOO NATIONAL BANK,
and THE WATERLOO GASOLINE ENGINE CO., Intervener-
ers, Appellants, HOWELL RALSTON, ET AL., Defendants.

Pleadings: OBJECTION TO SUFFICIENCY. An objection to the insufficiency of a pleading which was in no manner tested on the trial, is unavailable on appeal, where enough was alleged to present the issue upon which the case was tried and no objection was made to the evidence offered in support thereof.

What constitutes a homestead: LIABILITY FOR DEBTS. The homestead law is to be liberally construed, and under this rule the residence of a divorced husband which he himself, and an adult daughter who came to live with him as his housekeeper at the time of the divorce, occupied until his death, constituted his homestead, in the absence of satisfactory proof that he was obligated to pay the daughter's service; and the same was exempt from judicial sale for his debts, or those of an heir who had conveyed his interest therein.

Appeal from Monroe District Court.—HON. F. W. EICHELBERGER, Judge.

WEDNESDAY, FEBRUARY 8, 1905.

THIS is an action in partition brought originally by Agnes White *et al.* against defendant Ralston. The Waterloo Bank and the Waterloo Gasoline Engine Company intervened, claiming judgment liens upon the interest of defendant Frank Ralston in and to the property in controversy. Lydia Fox, one of the defendants in the main suit, filed a cross-petition claiming that a certain 40 acres of the land in controversy was the homestead of John Ralston at the time of his death; that Frank Ralston, one of his heirs, took his interest in this homestead free from the debts of his ancestors as well as his own; and that he conveyed his interest therein free from any judgment liens in favor of his creditors. The

trial court rendered a decree in favor of the cross-petitioner, and the interveners appeal.—*Affirmed.*

J. F. Abegglen and Ezra A. Maxwell, for appellants.

Mason & Mason, for appellees.

DEEMER, J.—Before going to the merits, it is well to notice a claim made by appellants that the cross-petitioner does not sufficiently plead the homestead character of the property in dispute. Had the pleading been tested by motion, doubtless this would be true; but there was enough, in the absence of a motion for more specific statement, to raise this issue; and, as the case was tried on the theory that this point was in issue, and no objections were lodged against the testimony offered to sustain the homestead character of the land, there is no merit in the contention. The point was in no manner raised or suggested in the trial court, and, if the homestead character of the land was not involved, there was nothing to try; that being the sole issue in the case.

John Ralston, who at one time owned the land, and through whom all persons are claiming, came to Iowa many years ago, and acquired the land in controversy. He and his wife, Elizabeth, moved upon the land, and occupied it as a homestead, save as hereinafter stated, down to the time that John obtained a divorce from his wife, in October of the year 1894. John and his wife were not happily mated, and in the year 1891 they separated and agreed to live apart. Shortly before their separation, John conveyed to his wife eighty acres of land in section 7 of a certain township in Monroe county, Iowa; and the wife, Elizabeth, quitclaimed to her husband one hundred and sixty acres of land in section 8 of the same township. The land in dispute is in section 8. Upon separation the wife, with certain of the children of the marriage, left the homestead theretofore occupied by the family, and

1. PLEADINGS:
objection to
sufficiency.

2. WHAT CONSTI-
TUTES HOME-
STEAD: liability
for debts.

went to live upon the land in section 7. As soon as the mother left and went to live upon the land deeded to her by her husband, an adult daughter, who had theretofore been teaching school, abandoned this avocation, and went to live with her father upon the land in dispute. A son (Frank) also made his home with the father for a short time after the separation of his parents. When the decree of divorce was granted, the conveyances between husband and wife were confirmed, and each was decreed to hold his title as if the relation of husband and wife had never existed between them. Nothing was said in this decree about a homestead in either tract of land, the conveyances of which were thus approved. From the time of the decree down to the death of John Ralston, Lucy, his daughter, kept house for him; and the two lived upon the land in controversy, making it their home. The arrangement between the father and daughter is not very clearly shown. It does appear, however, that she abandoned her occupation of school-teaching, and went to live with her father, and to keep house for him, almost immediately upon the separation of her parents, and that she continued to live with and keep house for her father down to the time of his death. She filed a claim with the administrator of his estate for services rendered the father from July, 1891, to December 8, 1901. This claim was settled in some way, but just how does not appear, save that the heirs made some sort of an adjustment of the matter. The daughter, Lucy, asked permission to explain this claim while she was on the witness stand, but for some reason not appearing of record, was not permitted to do so. It is a conceded fact, however, that, from the time of the separation down to the death of John Ralston, he lived upon the homestead originally acquired by him, which is the land in dispute, and that his daughter Lucy lived with and kept house for him.

If the property in dispute was the homestead of John Ralston at the time of his death, then the decree of the trial court is correct; but, if it was not, then the case should be

reversed, and the interest of Frank Ralston, one of John's sons, should be made subject to the liens of appellants' judgments against him. Was the property then the homestead of John Ralston?

Section 2973 of the Code of 1897 provides, in substance, that a widower, though without children, shall be deemed a family, while continuing to occupy the real estate used as a homestead at the death of the wife, and that such right shall continue to a party to whom it is adjudged in a decree of divorce, during continued personal occupancy. This provision as to the right of a divorcee first appeared in the Code of 1897. It was not in existence when John Ralston obtained his divorce, but was in effect when appellants obtained their judgments, and, so far as appears, when the debts upon which the judgments were based were contracted. Section 2985 provides, in substance, that, if there be no survivor of husband or wife, the homestead shall descend to the issue of either, according to the rules of descent, and is to be held by the issue exempt from the antecedent debts of their parents and their own.

The trial court held that the amendment of section 2973 of the Code, giving a divorcee a homestead right in property awarded him, during continued personal occupancy, did not apply to the case, because it was not and could not be made retroactive. Conceding, *arguendo*, the correctness of this holding, we yet have the question, was the property the homestead of John Ralston at the time of his death by reason of his occupancy thereof with his daughter Lucy? Under our law the homestead of every family is exempt from judicial sale. And a family has been defined to be a collective body of persons who live in one house under one head or management. *Tyson v. Reynolds*, 52 Iowa, 431; *Parsons v. Livingston*, 11 Iowa, 106. One person cannot constitute a family, within the meaning of our homestead laws, save as recognized in section 2973 of the Code. And it is quite generally held that one who lives alone, with no one but servants or em-

ployés to assist him, is not entitled to a homestead. *Whaley v. Whaley*, 50 Mo. 577; *Calhoun v. Williams*, 32 Grat. (Va.) 18 (34 Am. Rep. 759); *Howard v. Marshall*, 48 Tex. 471; *Ellis v. Davis*, 90 Ky. 185 (14 S. W. Rep. 74). In such cases some sort of relationship must exist between the head and the other members of the group. According to some courts, this relationship must be such as that the inferior member or members is entitled by law to look to the superior both for support and protection, or, as said in some of the cases, there must be an obligation upon the head of the house to support the others, or some of them, and a corresponding dependence upon the part of the members so supported. *Harbison v. Vaughan*, 42 Ark. 539; *Bosquett v. Hall*, 90 Ky. 567 (13 S. W. Rep. 244, 9 L. R. A. 351, 29 Am. St. Rep. 404). But by some of the cases this obligation and dependence need not be a legal or enforceable one, a moral or natural one being held sufficient. *Ellis v. White*, 47 Cal. 73; *Holnback v. Wilson*, 159 Ill. 148 (42 N. E. Rep. 169); *Taylor v. Boulware*, 17 Tex. 74 (67 Am. Dec. 642); *Wade v. Jones*, 20 Mo. 75 (61 Am. Dec. 584); *Moyer v. Drummond*, 32 S. C. 165 (10 S. E. Rep. 952, 7 L. R. A. 747, 17 Am. St. Rep. 850); *Connaughton v. Sands*, 32 Wis. 387. Thus a man supporting an indigent father, mother, brother, or sister has been held to be the head of a family. *Parsons v. Livingston*, 11 Iowa, 104; *Marsh v. Lazenby*, 41 Ga. 153; *Chamberlain v. Brown*, 33 S. C. 597 (11 S. E. Rep. 439). So, also, a father whose adult daughter supported herself by teaching school, but who also performed household duties for him in compensation for her board, was held the head of a family. *Doolin v. Dugan*, 12 Ky. Law Rep. 749. So, also, a father who resided on his own land with an adult son and daughter. *Versailles Bank v. Guthrey*, 127 Mo. 189 (29 S. W. 1004, 48 Am. St. Rep. 621). Also a widow occupying a homestead with two adult children. *Brooks v. Collins*, 11 Bush (Ky.) 622. But we need not multiply cases from other jurisdictions. In *Whalen v. Cadman*, 11 Iowa, 226,

we held that an unmarried man who lived with his brother and his brother's wife, and who worked the farm on shares with the brother, was not the head of a family. But it was said in that case that the head of a family is primarily the husband or father, and that a son having mother or brothers or sisters, or either, depending upon him for support, and living in a household which he controlled, might be such head. In *Arnold v. Waltz*, 53 Iowa, 706, it was held that an unmarried woman who had taken charge of two children of a deceased sister upon the latter's death was the head of a family, and entitled to a homestead. In *Parsons v. Livingston*, 11 Iowa, 104, the plaintiff was a widower, who purchased the property claimed as a homestead, and took up his residence thereon, taking with him his mother, who was without other children. They continued to live upon the property, the plaintiff supporting his mother. Held, that plaintiff was the head of a family. In *Tyson v. Reynolds*, 52 Iowa, 431, a widower, with whom lived his son and his son's wife, and who employed a household servant, was held to be the head of a family. In that case it was said that the relation existing between such persons must be of a permanent and domestic character—not abiding temporarily together as strangers. “There need not, of necessity, be dependence or obligation growing out of the relation.” In that case the son and his wife were provided for by the father as children or dependents. *Woods v. Davis*, 34 Iowa, 264, is also an instructive case.

These references show the trend of our decisions, and demonstrate that we are in full accord with those courts which hold that these homestead statutes should be liberally construed, and the reason and the spirit thereof conserved, rather than the letter. While in one case it was said that there need not, of necessity, be dependence or obligation growing out of the relation, we think that what was meant was that there need not be any legal obligation or condition of dependence, and this is what we now hold. But we do think

that, generally speaking, there must be something more than the mere relation of master and servant. In other words, there must be a natural or moral obligation of support, and a condition of dependence and actual support is sufficient. This is the rule sanctioned by the greater weight of authority, and the one which more nearly comports with the reason and spirit of the law.

Now, in the instant case the adult daughter abandoned her occupation as a teacher, and went to live with her father, after his separation from his wife, as his housekeeper. Under such a situation the father was morally bound to support the daughter. It may be he was legally bound, for there is no showing here of any such facts as would justify a recovery by the daughter for services rendered the father. There was no proof of any fact which would create an obligation on the father's part to pay for the services rendered by his daughter. They were, so far as shown, entirely gratuitous. The filing of the claim is a circumstance, or, rather, an admission by the daughter that she was to have compensation for her services; but this was compromised, was not paid in full, and was not approved by the probate court. Moreover, it was not binding upon the parties to this litigation, either as an adjudication or as an estoppel. The witness Lucy was not permitted to explain it, and, at most, it should be treated simply as a contradictory statement made by her. But she did not, in this claim which she filed, plead that there was any contract between herself and father whereby she was to receive compensation for her services.

Construing these homestead statutes "in the liberal spirit in which the provisions thereof are to be considered, in favor of those for whose benefit they were enacted," we think the trial court was right in holding that the property in controversy was the homestead of John Ralston at the time of his death, and in passing a decree in favor of the cross-petitioner.— *Affirmed.*

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| 126 | 488 |
| 132 | 642 |
| 120 | 488 |
| 144 | 668 |

ALEXANDER DE MERS v. TIMOTHY ROHAN, Appellant.

Division fences: PARTITION. There are but two methods of dividing partition fences, one by order of the fence viewers, and the other by written agreement as provided by Code, sections 2350 and 2361; and a division based on a mere understanding of one landowner with the tenants of the other is of no effect.

Duty to maintain. Where there has been no legal partition of a division fence, the duty of maintaining the entire fence rests on both owners alike, and neither can complain of the neglect of the other.

Trespassing animals: LIABILITY OF OWNER. Where there has been no legal partition of a division fence and the stock of one adjoining owner break through onto the land of the other and then into an enclosure surrounded by a lawful fence, the owner of the stock is liable for the damage done.

Evidence: DISTRAINT. In an action for damages from trespassing cattle, an explanation of why the cattle were not distrained as soon as discovered, was properly admitted.

Appeal from Woodbury District Court.—HON. GEO. W. WAKEFIELD, Judge.

WEDNESDAY, FEBRUARY 8, 1905.

ACTION to recover damages caused by trespassing cattle. From judgment as prayed, defendant appeals.—*Affirmed.*

Sullivan & Griffin, for appellant.

Geo. W. Argo, for appellee.

LADD, J.—The farm of Fortin, occupied by plaintiff as tenant, joins that of defendant on the south. A railroad runs through both farms. Defendant built the line fence from the railroad to the west, and Fortin or his grantor that to the east. But the evidence fails to establish any agreement between them as to what portion each should erect or maintain. The only

1. DIVISION
FENCES: par-
tition.

evidence on this subject is that of defendant, who testified: "I had an arrangement through the renters as to which part of the fence I should maintain. Mine was west of the railroad track, and his was east. I built and maintained the west part, and they built and maintained the east part. It had been kept that way ever since I bought the farm in 1885." No authority for this was traced to Fortin or his grantor, and the evidence indicated that the fence east of the track had never been a legal fence. The court instructed the jury that the evidence showed "an agreement between the owners of the land assigning the maintenance of the respective portions of the fence." We cannot concur in this view. But two modes of dividing partition fences are recognized by statute — one by written agreement, and the other by order of the fence viewers. Sections 2356, 2361, Code. Neither of these was followed. Nor can it be said that the duty to maintain the fence to the east arose by prescription. Such an inference is obviated by proof that it never complied with the statutory requirements, and that it was erected in pursuance of an oral agreement with tenants. See *Rust v. Low*, 6 Mass. 90.

The mere fact that Fortin or his grantor constructed a fence of some kind will not support the inference that it was erected in pursuance of an agreement with either of them

dividing the line, for either adjoining owner,

2. DUTY TO MAINTAIN—in the absence of division, has the right to build

such portions of the fence as he may see fit, and the duty of maintaining every portion of it rests on both alike. Neither is in a situation to complain of neglect in not so doing on the part of the other. *Sturtevant v. Merrill*, 33 Me. 62; *Thayer v. Arnold*, 4 Metc. (Mass.) 589; *Lawrence v. Combs*, 37 N. H. 335 (72 Am. Dec. 332). See note to *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255 (49 Am. Dec. 239), and to *Myers v. Dodd*, 9 Ind. 290 (68 Am. Dec. 624).

The authorities are in conflict as to whether an oral agreement dividing a line fence is within the statute of

frauds. In the negative will be found: *Ivins v. Ackerson*, 38 N. J. Law, 220; *Guyer v. Stratton*, 29 Conn. 421. In the affirmative: *Osborne v. Kimball*, 41 Kan. 187 (21 Pac. Rep. 163); *Glidden v. Towle*, 31 N. H. 147, 163; *Knox v. Tucker*, 48 Me. 373 (77 Am. Dec. 233); *Pitzner v. Shinnick*, 41 Wis. 676. There is no question but our statute contemplates a written agreement. Section 2361 of the Code provides that "the several owners may, in writing, agree upon the portion of the partition fence between their lands which shall be erected and maintained by each, which writing shall describe the land and the parts of the fences so assigned, be signed and acknowledged by them, and filed and recorded in the office of the recorder of deeds of the county or counties in which they are situated." In providing for a written agreement, and specifying the circumstances under which it will be binding, the intention to exclude any other is manifest. Possibly an agreement in parol, when executed, may be good between the immediate parties thereto. Such was the holding in *York v. Davis*; 11 N. H. 241. As it affected the immediate parties only, however, the court decided that the jurisdiction of the fence viewers to make a permanent division was not ousted. In *Pitzner v. Shinnick*, 41 Wis. 676, the question as to whether a mere parol division will bind third persons who may become owners or lessees of the premises, and have in no way recognized or acted upon the division, was decided in the negative, and we deem this the correct rule. The statute has pointed out the methods of establishing a permanent partition, and to effect this, one of these should be followed.

In the instant case plaintiff knew nothing of any previous arrangement by defendant with the tenants preceding him, and it was in no way obligatory on him. The court, then, was in error in assuming that, as to the parties to this action, there had been any partition of the line fence. The error, however, was without prejudice. The evidence tended to show that the cattle

8. TRESPASSING
ANIMALS: lia-
bility of
owner.

passed over the line between the farms east of the tract upon that of plaintiff, and thence to the yard near his house. This was surrounded by a fence which the jury might well have found met the requirements of the statute. Through it defendant's cattle broke, and therein damaged plaintiff's feed and grain, as was alleged. Had there been a partition of the line fence, and had the cattle escaped because of plaintiff's neglect to maintain his portion, there would be ground for the contention of appellant that there could be no recovery, even though the yard were inclosed with a lawful fence, though the court instructed otherwise. See *Singleton v. Williamson*, 7 Hurlst. & N. 410; *Ricketts v. Ry.*, 19 English Ruling Cases, 18; *Page v. Olcott*, 13 N. H. 399. If such were the case, the escape of the cattle on plaintiff's premises would have been owing to his own neglect to maintain the partition fence, and the damages to the property in the yard, according to the decisions cited, even though inclosed by a sufficient fence, the natural consequences flowing from such neglect. Said Pollock, C. B., in the first case:

When wrong is done, and consequential damage sustained, the law inquires who committed the first wrongful act and thereby occasioned the mischief? In this instance the defendant, who was the owner of a close called "Bridge Green," was bound securely to fence it so that the cattle of the plaintiff, who was owner of an adjoining close, might not be able to stray into it. This the defendant neglected to do, and in consequence the cattle of plaintiff strayed in Bridge Green, and from thence into another close of the defendant, called Cornfield. It is argued that the cattle getting into the cornfield was not a necessary consequence of defendant's neglect to keep up the fence of Bridge Green. Certainly it was not a necessary consequence; it was not a *causa causans*; but it was a *sine quo non*. If a pit be dug in a highway or any place where persons have a right to pass, it is not a necessary consequence that any one should fall into it, although it may be that, either in the night or day time, someone would do so. In such a case it is sufficient if the injury is the accidental result of the wrongful act.

The New Hampshire case is precisely in point. There the sheep of the defendant escaped from his inclosure into the plaintiff's pasture lands, through the insufficiency of that portion of the fence which the plaintiff was bound to repair, and thence into the *locus in quo*. The court after full consideration, concluded that the

The plaintiff's negligence must be regarded as that occasioning the damage sustained. It is a fair presumption which the law will make that if the plaintiff had performed her duty properly, in repairing her part of the division fence, the sheep would not have escaped from the pasture of the defendant, and the damage complained of would not have been sustained. And it is clear that while, under the circumstances of the case, the plaintiff is, in law, to be regarded as having contributed to the result of which complaint is made, she can have no action for the damage sustained, against the defendant, who has not occasioned it either by positive wrongful acts or by any negligence whatsoever.

In the instant case, however, there was no partition of the line fence, and the omission to keep it in repair was not due to any neglect on the part of the plaintiff of which defendant might complain; and in view of the holding of this court in *Wagner v. Bissell*, 3 Iowa, 396, and like cases, the defendant was not bound to restrain his stock. They were running at large. This did not shield the owner, however, from liability, if they broke the close of plaintiff surrounded by a lawful fence. *Frazier v. Nortinus*, 34 Iowa, 82; *Herold v. Meyers*, 20 Iowa, 378. That they entered such close and committed depredation is not disputed. The only issues for the jury were the sufficiency of the fence inclosing the yard, and the amount of damages, and these were fairly submitted. That the line fence furnished no obstruction to cattle was undisputed, and for this reason the jury must have based their decision upon a finding of the sufficiency of the yard fence.

II. The rulings on the admissibility of evidence were

correct. The testimony of the illness of plaintiff's wife was properly received, as explaining why the cattle were allowed to remain at the corn pile after being discovered.

That concerning defendant's forceable taking of his cattle from plaintiff's inclosure was so connected with the restraint and trespass of the stock as to be admissible as a part of the transactions.

That part of the motion for new trial based on alleged surprise and newly discovered evidence was properly denied. It is possible that defendant did not personally know that the petition claimed damages caused by the cattle breaking through the inclosure of the yard, but of this counsel must have been aware. At any rate, they were soon apprised by the evidence introduced, and if so taken by surprise as not to be able to safely proceed with the trial, a continuance should have been asked. For all that appears, the additional evidence, by the exercise of ordinary diligence, could have been procured.

Finding no prejudicial error, the judgment is *affirmed*.

CHAS. ROUSH V. GESMAN BROTHERS & GRANT, Appellants.

Contracts in restraint of trade. An agreement to refrain from

- 1 doing a real estate and insurance business in a limited territory and for a valid consideration is enforceable.

Brokerage agency: TRANSFER. The contract of a real estate agent

- 2 to transfer to another a list of properties which he has for sale on commission that such other may arrange terms of sale with the owners, is not a transfer of the agency and therefore not objectionable on that ground.

Commissions: DIVISION BETWEEN AGENTS: EVIDENCE: VERDICT. In

- 3 an action between real estate agents for a division of commissions on the sale of farms listed and turned over by the plaintiff to defendants, the court charged that the plaintiff could not recover for the sale by defendants of lands not listed with him by the

owner, but in view of the evidence that a son of the owner of a certain farm was authorized to list the same and in fact listed it with plaintiff, the verdict including a commission for the sale thereof is sustained.

Admission of evidence: REVERSIBLE ERROR. A cause will not be reversed because a witness has been permitted to answer leading questions or to state a conclusion, where it is apparent from the whole evidence that no prejudice resulted, although technically the rulings were incorrect.

Appeal from Marion District Court.—HON. EDMUND NICHOLS, Judge.

WEDNESDAY, FEBRUARY 8, 1905.

ACTION at law to recover one-half of the real estate commissions realized by defendants from business turned over to them by plaintiff in pursuance of a contract by which plaintiff was to give up his real estate business to defendants, and refrain from doing such business during the continuance of the contract. Verdict for plaintiff for \$440, on which the court rendered judgment for \$322.50. From this judgment, defendants appeal.—*Affirmed.*

Kinhead & Mentzer, for appellants.

Bousquet & Lyon and *Hayes & Amos*, for appellee.

McCLAIN, J.—In June, 1901, plaintiff was in the real estate and insurance business at the town of Monroe, and defendants were opening a rival business of the same character.

The evidence tends to show that thereupon the plaintiff and defendants entered into an oral agreement, by which plaintiff was to turn over to defendants what farms he had for sale, and that defendants should pay to the plaintiff one-half of the commissions received for the sale of those farms, in the event they succeeded in selling the same; and, further, that plaintiff would refrain during the continuance of the

1. CONTRACTS IN
RESTRAINT OF
TRADE.

contract from doing any real estate business except what was called "Oklahoma business," and defendants should refrain from doing any insurance business. This contract was valid, for it related to a limited territory (*Swigert v. Tilden*, 121 Iowa, 650), and was based on a valid consideration. Plaintiff complied with the contract on his part, as the evidence tends to show, for he advised defendants as to the farms which had been listed with him, and refrained from further prosecuting his real estate business until after the arrangement between him and the defendants was abandoned by both parties. Defendants sought to show on the trial that plaintiff had withheld from defendants information with reference to one farm, and had sought to make sale thereof himself. But as to this there was conflict in the evidence, and the case was one for the jury.

The contract is attacked by appellant, however, on another ground, to-wit, that plaintiff, as agent for the owners of farms listed with him for sale, could not transfer his authority. But it does not appear that in the

2. BROKERAGE
AGENCY: trans-
fer.

contract he attempted to do so. What he did undertake to do was to turn over to the defendants his list of properties, in order that defendants might make arrangements for themselves with the owners of these properties, to act as agents for their sale. This is the construction of the contract indicated by the conduct of the defendants, for they proceeded at once to enter negotiations with the parties whose properties were listed with plaintiff, to secure from them the authority to act as their agents. The opportunity to do so was a valuable right, which plaintiff could transfer, although he could not assign to the defendants the right to act as his customers' agent in carrying out plaintiff's contracts without the assent of such customers.

There was evidence tending to show the sale of four farms by defendants, which had been turned over to them by plaintiff in the method contemplated by the contract, and

that they had received \$880 commissions for the sale of these

3. COMMISSIONS: four farms. And the jury returned a verdict
 division be-
 tween agents; for plaintiff for one-half that amount. But
 evidence;
 verdict.

the court set aside that verdict so far as it included a share of the commission as to one of these farms, which, as it appeared by special findings of the jury, had yielded no commission to the defendants, and judgment was rendered for \$322.50. As to the three farms for which plaintiff was allowed to recover one-half the commissions received by defendants, there was evidence supporting the verdict. Complaint is made that as to one of these farms plaintiff had no authority to sell, because it had been listed with him by the son of the owner, without the owner's consent. But the court instructed the jury to the effect that commissions received by defendants in the sale of property listed by the person having no authority to place, such property in his hands for sale could not be considered, and we think that there was sufficient evidence to support the verdict as to this particular farm that the son of the owner was authorized by his father to list it for sale with an agent.

No complaint is made of the instructions, and as we find there was evidence sufficient under the instructions to support the verdict so far as the court rendered judgment

thereon, we have no occasion to interfere, unless it may be on account of certain objections urged as to the rulings on the introduction of evidence. We have examined the rulings and the objections on which they were made, and find nothing therein which requires extended consideration. They were, in our judgment, technically correct. But, even if open to technical objection, such as that questions were allowed which called for the conclusion of a witness, or were leading in form, they could not possibly have been prejudicial to the defendants under the evidence presented. It would not be of benefit to any one if we should elaborate

4. ADMISSION OF
 EVIDENCE:
 reversible
 error.

the grounds on which these conclusions are based. They will be readily understood by counsel.

Finding no prejudicial error in the record, the judgment is *affirmed*.

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| 126 | 497 |
| 135 | 50 |
| 135 | 375 |
| 135 | 589 |

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| 126 | 497 |
| 136 | 750 |

STATE OF IOWA v. W. A. RICHARDS, Appellant.

Burglary: IMPANELING GRAND JURY: PLACE OF HOLDING COURT. The

1 adjournment of court duly convened in the court room to another room in the court house which was adequate for the purpose of impaneling the grand jury, and to permit a defendant charged with crime who was in a weak physical condition to be present, was not a violation of Code, sections 283 and 286, providing that judicial proceedings must be public and held at the place provided by law.

Evidence: TELEGRAMS. A telegram sent by defendant to his asso-

2 ciate in the crime, which was shown to have been agreed upon beforehand and which corresponded with the agreement, was admissible; especially as there was evidence tending to show that defendant sent it.

Conversations in defendant's hearing. In a prosecution for bur-

3 glary claimed to have been planned by defendant, evidence of a conversation between two others relative to a deposit of the money stolen, was admissible, there being evidence that defendant was within hearing distance.

Cross-examination: PREJUDICIAL ERROR. Where a physician test-

4 fied that defendant employed him shortly after the burglary and paid him for his service requesting that he "keep still," it was not prejudicial error to refuse the cross-examination of the physician as to his qualification to practice medicine.

Evidence: GENERAL MORAL CHARACTER. Where a witness has testi-

5 fied in chief to his knowledge of the general moral character of defendant, and that it was good, he may be cross-examined on that question as to his knowledge of any matters tending to discredit his estimate of defendant's character. In the instant case, moreover, the answers on cross-examination are held to have been without prejudice.

Instructions: FLIGHT. In a prosecution for burglary, an instruc-

6 tion that flight is a circumstance which *prima facie* indicates guilt, is not objectionable as charging that it was presumptive evidence of guilt.

Appeal from Warren District Court.—HON. J. H. APPLE-
GATE, Judge.

THURSDAY, FEBRUARY 9, 1905.

A JURY found the defendant guilty of the crime of burglary, and he appeals from a judgment on the verdict.—*Affirmed.*

Kinkead & Mentzer, for appellant.

Chas. W. Mullan, Attorney-General, and *Lawrence De Graff*, Assistant Attorney-General, for the State.

SHERWIN, C. J.—The burglary in question was planned by the defendant, and was executed by Frank Baird and Chas. Redup. Baird was shot immediately after he left the house that he had entered, and was soon thereafter captured, and was held to answer for the crime. A regular term of the district court was held soon thereafter at Indianola, the county seat of Warren county. After the court was convened in its regular room in the courthouse, and opened for the transaction of business, the presiding judge announced from the bench that the session would be adjourned to the office of the county superintendent, on the first floor of the courthouse, for the purpose of impaneling the grand jury. This was done, and the grand jury was impaneled in said room, and afterward returned the indictment on which the defendant was tried. Baird was at that time in a weak physical condition, and the court's action was for the purpose of having him present when the grand jury was impaneled without physical injury to him. The defendant was not held to answer and no one appeared for him at that time. The room in question was large enough to accommodate the court and its officers, the jurors and attorneys, and a number of the general public. After it

1. IMPANELING
GRAND JURY:
place of hold-
ing court.

had been well filled, the door thereof was closed for a short time, for the purpose of avoiding overcrowding. Because of the foregoing facts, the appellant contends that the court was not legally in session, nor the grand jury legally impaneled, and that the indictment was invalid. Section 286 of the Code provides that "courts must be held at the place provided by law, except for the determination of actions, special proceedings, and other matters not requiring a jury, when they may, by consent of the parties therein, be held at some other place." And section 283 of the Code provides that all judicial proceedings must be public, unless otherwise specially provided by statute or agreed upon by the parties.

The manifest purpose of the requirement that courts shall be held at the place provided by law is to give due stability and dignity to the administration of justice, and to protect the interests of litigants. In *Hobart v. Hobart*, 45 Iowa, 501, it was said that, to give existence to a court, its officers and the time and place of holding it must be such as are prescribed by law. This rule was recognized in *Casey v. Stewart, Adm'r*, 60 Iowa, 160; *Moore v. C. & St. P. & K. Ry. Co.*, 93 Iowa, 484, and again in *Funk v. Carroll County*, 96 Iowa, 158. In the *Funk Case* the issue was tried to the court, and the testimony of a witness was taken at his residence, away from the courthouse, and we held that the court had no authority to adjourn to a private house for the purpose of a trial. There is a well-defined distinction, however, between the cases cited and the one at bar. Here the court was formally and regularly convened at the courthouse, in its own room, and the adjournment was to a room in the same building. It may readily be conceded that the word "place" may sometimes mean a particular room or a particular spot in a room, but we are cited to no judicial construction so limiting it in a case of this kind. If the court be held in the building provided by law, though not in the room set apart for that purpose, we think the requirement

and reason of the statute are fully met. To limit the place to a particular room in the courthouse would in many instances interfere with the reasonable dispatch of business, and would serve no recognized purpose of the statute; hence we do not believe that it was the legislative intent to so limit the language. The proceedings when the grand jury was impaneled were public, within the meaning of the statute. The public was admitted, to the capacity of the room, and so far as the record shows, a large proportion of those who desired to attend were present. *State v. Worthen*, 124 Iowa 408; *Myers v. State*, 97 Ga. 76 (25 S. E. Rep. 252); *State v. Brooks*, 92 Mo. 542 (5 S. W. Rep. 257, 330); *Stone v. State*, 2 Scam. 326.

The telegram which the State claimed was sent by the appellant to Baird was properly admitted in evidence. Baird testified that its contents were agreed upon before hand, and it corresponded with such agreement. Furthermore, there was testimony tending to identify the defendant as the person who delivered it to the operator for transmission to Baird. The opinion or best judgment of a witness is competent when he cannot positively identify the person, and the value thereof is a question for the jury. *State v. Lucas*, 57 Iowa, 501; *State v. Seymour*, 94 Iowa, 706.

There was evidence tending to show that the appellant was within hearing distance, and could have heard the conversation between Wilcox and Long relative to the deposit of the money which the burglars secured, and we think the conversation was properly admitted in evidence.

Dr. Tandy, a witness for the State, testified that the appellant had employed him to treat Baird's gunshot wound soon after he was captured, and that he paid him for such services, and requested him to "keep still." On cross-examination the doctor was not permitted to answer a question, touching his qualifica-

2. EVIDENCE: tele-grams.

3. CONVERSATIONS IN DEFENDANT'S HEARING.

4. CROSS-EXAMINATION: prejudicial error.

tions to practice medicine in this State. The testimony might well have been received, but its exclusion could not have been prejudicial to the defendant, and does not require a reversal of the case.

There was no error in admitting the ice pick, revolver, and billy in evidence. They were sufficiently identified, and were admissible as a part of the history of the case. *State v. Gray*, 116 Iowa, 234; *State v. Tyler*, 122 Iowa, 125.

A witness for the defendant testified that he knew what his general moral character was and that it was good. On cross-examination he was asked if he knew that the de-

fendant had been "running a joint," and that

5. EVIDENCE:

general moral
character.

he visited saloons and used liquor, and, further, whether he had ever "discussed the fact that he was an embezzler." The first and last of these questions were answered negatively, and, under the holding in *State v. Tippet*, 94 Iowa, 646, and *State v. McGee*, 81 Iowa, 17, the defendant was not prejudiced thereby. To the other questions the witness answered that he had seen the defendant in saloons, but not frequently, and that he used liquor sometimes, but not to excess. An occasional visit to a saloon or an occasional drink would not ordinarily seriously affect the general moral character of a man, either in the estimation of an ordinary community or in the estimation of a jury and, for these reasons, we do not think the testimony was prejudicial to the defendant. But aside from this, we think it was competent. The witness testified in chief that he knew the general moral character of the defendant, and that it was good. It is apparent from his entire testimony that this answer was based upon his acquaintance with the defendant, and that it was his personal estimate of his character, as distinguished from his reputed character. That the real character may be proven is held in *State v. Sterrett*, 68 Iowa, 76, and *State v. Cross*, 68 Iowa, 180. It is manifest that, when proof has been received as to the real character of the accused, it is competent to cross-

examine on the question, and any knowledge possessed by the witness which tends to discredit his estimate of such character is admissible. It is well settled, of course, that this line of cross-examination is not competent when the reputation is in question, rather than the actual character. And such is the holding of the cases cited and relied upon by the appellant.

The eighth instruction is complained of. Therein was defined an accessory before the fact, and the court stated that, if certain facts were found proven, the jury should find the defendant guilty. The facts referred to were supported by evidence, and tended to show the defendant's participation in the crime, and, if true, there could be no doubt that he aided and abetted its commission. The instruction was therefore correct.

There was evidence tending to show flight after the crime was committed, and the court instructed thereon. The instruction announced the law applicable thereto. *State v.*

Seymour, 94 Iowa, 699; *State v. Rodman*, 62
6. INSTRUCTIONS: Iowa, 456; *State v. James*, 45 Iowa, 412. It
flight.

is said, however, that the statement therein that flight is a circumstance which *prima facie* is indicative of guilt, in effect, told the jury that it was presumptive evidence of guilt, and was erroneous, under the holding in *State v. Poe*, 123 Iowa, 118. But such is not the case. "Indicative" means to give a suggestion of something, and *prima facie* means at first view, so that the expression means nothing more than that, at first view, flight suggests guilt; and it must be conceded, we think, that, if it is not a circumstance suggesting guilt, evidence thereof is not competent for any purpose. There is no merit in the other criticism made of the ninth instruction.

The instruction on the question of the defendant's previous good character need not be set out here. It has been given by trial courts times without number, and has been again, and yet again, approved by this court, and is the

law governing the case. *State v. House*, 108 Iowa, 69; *State v. Northrup*, 48 Iowa, 585.

We have given this case the consideration which its importance to the defendant and to the public demands, and find no error for which there should be a reversal. The judgment is therefore affirmed.—*Affirmed*.

J. E. SPERRY and ROSE A. McCULLOUGH v. IMOGENE C. SPERRY, Executrix and Trustee, Appellant.

Wills: CONSTRUCTION: PARTICIPATION IN REAL ESTATE. In the construction of the various provisions of the will and codicil in question, it is held that the widow as trustee held title to a certain eighty acres from which a bequest to one of the heirs was to be made equal to that of others, and that the balance was intended for the use of still other heirs to whom no specific devise of real estate was made.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

THURSDAY, FEBRUARY 9, 1905.

ACTION to construe certain provisions of a will. Order as prayed, from which defendant appeals.—*Modified*.

William T. Maxey, for appellant.

W. E. Blake, for appellees.

LADD, J.—John M. Sperry died testate in 1901, leaving him surviving, a widow and six children. For each of these, provision was made in the will, and the widow designated as executrix. By the third clause she was given the use of certain lands during her life, and the fourth directed her to control the “residue,” save that devised to the children, “for the uses and purposes hereinafter expressed.”

The sixth clause directed the payment of \$150 per year for eight years to J. E. Sperry, and the seventh clause contained a like provision for Rosa A. McCullough. The eighth, ninth, tenth, and eleventh clauses devise certain lands to each of the other children. After bestowing described tracts on P. W. Sperry, the eleventh clause reads: "As the mother trustee has in her control to rent or sell 80 acres described as follows: The S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ Sec. 14, Tp. 71 R. 3 W. She will be authorized to pay P. W. Sperry up to equalizing with Kate and B. M. Sperry." Certain discretionary powers were conferred on the executor in each of these. The thirteenth clause may be set out:

"All lands, lots and other property, if any remaining after filling all my bequests herein made, I give, devise and bequeath to my beloved wife, Imogene C. Sperry, to be retained or sold by her at the pleasure of my wife, Imogene C. Sperry, she to have the same, absolutely, to use or dispose of, as she may see fit during her natural life.

"Continued lot, eighty (80) acres described in article eleven to my wife, controlled as trustee for all the heirs; to sell or continue to rent."

The will was executed March 1, 1899, and on the 4th day of June, 1900, the deceased made a codicil, with clauses corresponding in number with those in the will, "instructing and explaining more fully" his wishes to the executor, in which words are defined, and he declares that \$600 has been advanced on the bequest to J. E. Sperry, and remarks: "All correct for Rosa A. McCullough." Clause 13 was as follows: "The words, all the heirs, does not mean those having share in real estate."

The only question to be determined is the ownership of the eighty acres. The district court decreed that the executrix held it for the sole benefit of plaintiffs. The authority of the executrix to rent or sell it is not questioned, but plaintiffs contend that, as they are the only heirs to whom real estate was not specifically devised; it was the

intention of the testator that they have this tract. The will and codicil should be read together as one instrument, as nearly as may be; and, as argued by appellant, the law does not favor revocation of conditions of a prior will by implication. Putting the two, in so far as they relate to this land, together, the last paragraph of the thirteenth clause reads:

“Continued lot, eighty acres described in article eleven to my wife, controlled as trustee for all the heirs not having share in the real estate; to sell or continue to rent.”

As land was specifically devised to each of the others, the plaintiffs, J. E. Sperry and Rosa A. McCullough, must have been intended. Though the gift is not expressed in explicit terms, it is necessarily to be implied from the language employed. The provision is not open to the criticism of being vague and ambiguous. Apparently all other property had been disposed of, and the devise of the eighty was to his wife, to be controlled for the benefit of plaintiffs. Clause 7 of the codicil had sole reference to the legacy, and for this reason is not inconsistent with the exclusion of those sharing real estate from participating in the devise of the eighty acres. But it is said that the eleventh clause of the will indicated a purpose that the executor make use of this tract to equalize the division among the heirs. This may be rejected, save as to P. W. Sperry, for whose benefit the last sentence seems too specific to be ignored. No charge on this land is created in favor of any other. As to him the authority to equalize with Kate or B. M. Sperry is specific, and the source from which the amount to accomplish this is to be obtained is pointed out as being the rent or proceeds of the sale of this land. But for the codicil limiting the heirs who are to take the eighty acres, appellees do not question the correctness of this construction. They insist, however, that, in excluding all heirs who share the real estate, P. W. Sperry was cut off both as one of the heirs and devisee entitled to enough therefrom to render his portion equal to that of Kate or B. M. Sperry. We do not con-

cur in this view. Under the will, he was entitled to enough from the eighty acres to equalize his portion under the eleventh clause, and to his part of the remainder as one of the beneficiaries designated as heirs in the eleventh clause. The codicil did not purport to deprive him of the first. It merely excluded him, with others, to whom real estate had been devised, from the class designated as heirs for whose benefit the executor was to take and control the tract subject to the conditions contained in the eleventh clause. This construction harmonizes the several provisions of both instruments, and is not inconsistent with the condition of either. Whether, in view of the devise to P. W. Sperry in the fifteenth clause, anything should be paid him, is a question with which we are not now concerned.

Some claim is made that extrinsic evidence should have been received. The record fails to show that any was offered.

The order of the district court will be modified so as to include a direction to the executor to pay P. W. Sperry enough from the rents or proceeds of the eighty acres to render what he received under the will equal to that of Kate Costner or B. M. Sperry.

Modified and *affirmed*.

W. B. CARTER, Appellee, v. GEORGE CEMANSKY, Appellant.

Municipal assessments: QUIETING TITLE. Where a municipal assessment is void, the plaintiff in an action to quiet title against a tax sale thereunder is not required, as a condition precedent to his right of action, to offer to pay that part of the tax which may be found valid; it will be sufficient if this is done when a right is asserted under the certificate of sale.

Objection to assessment. A property owner is not required to
2 appear before the city council and object to a municipal assessment for an unauthorized improvement in order that he may contest the validity of an alleged tax based thereon.

Estoppel. The payment of an installment of a void assessment
3 by one under whom plaintiff claims title, will not estop him
from contesting the validity of the tax; nor will the fact that
plaintiff's remote grantor took title "subject to all incum-
brances of record" operate as an estoppel against him.

Deeds: RECITALS: ESTOPPEL. The recital in a deed that it is "sub-
4 ject to all incumbrances of record" means subject to valid incum-
brances, and the same will not estop the owner from questioning
an invalid municipal assessment.

Municipal assessments: BENEFITS: LACHES. Where a municipal
5 assessment for grading a street is wholly void, the property
owner is not liable for benefits conferred; nor will delay in
suing to quiet title against the assessment constitute a de-
fense to that action.

Appeal from Woodbury District Court.—HON. GEORGE W.
WAKEFIELD, Judge.

THURSDAY, FEBRUARY 9, 1905.

SUIT in equity to quiet plaintiff's title to a certain lot
in the city of Sioux City, as against defendant's claim under
a certificate of purchase of the same at tax sale. Defendant
filed an answer and cross-bill asserting the validity of his
certificate, and making claim for subsequent taxes paid by
him on the lot. He also asked that, if the certificate be
declared invalid, he be given an equitable lien upon the
property for the amount of the taxes paid by him. Plaintiff
denied the validity of the taxes, and pleaded the illegality
of the certificate of purchase. The case was tried to the
court, resulting in a decree for the plaintiff, and defendant
appeals.—*Affirmed.*

Shull & Farnsworth, for appellant.

F. B. Robinson, for appellee..

DEEMER, J.—From the years 1888 to 1892, inclusive,
one Jandrey owned the lot above referred to. This lot
abutted upon Twelfth street, in the city of Sioux City. Dur-

ing the time that Jandrey was the owner thereof, the city ordered this street, as well as another abutting upon the property, and also an alley in the rear thereof, graded and filled, and thereafter assessed against the lot something near \$500, as its proportion of the expense of grading and filling Twelfth street. The taxes were made payable in five instalments, and confirmed as a lien against the lot. Notice was given as by statute provided for proper street improvements, but Jandrey did not appear or make any objection to the work or to the assessment. An assessment of \$20 was also made for grading the other streets. In 1892 Jandrey conveyed the lot to one Atwater, who took "subject to all special assessments." Before conveying to Atwater, Jandrey had made a mortgage on the lot to a trust company. The trust company foreclosed this mortgage, and became the purchaser at the sale. It subsequently quitclaimed its interest in the lot to the Fidelity Land Company, "subject to all incumbrances of record," and the land company conveyed the same to Statter. Statter, in turn, conveyed to the plaintiff. So that plaintiff traces his title through the foreclosure of the mortgage given by Jandrey. Some one paid two instalments of these special assessments, but it does not appear that they were paid by Jandrey, or by any one through whom plaintiff traces title. Defendant's certificate included sidewalk taxes assessed against the property amounting to \$12.90 (not including interest or penalty), and he also paid valid taxes amounting to something over \$18. These taxes are conceded to be valid, and plaintiff alleges that on April 22, 1903, which was after defendant's cross-bill was filed, he tendered the amount thereof, and that he (defendant) refused to receive the same. He also averred a readiness to pay the same in the answer filed by him to the cross-petition, offered and tendered the same into court, and thereafter paid the amount thereof, with interest and penalty, to the county auditor. He also offered to pay the costs of this suit down to the time the tender was made. In the decree rendered

by the trial court he was ordered to pay the costs in accord with the terms of his offer.

Defendant concedes that the grading tax was and is invalid, but he relies upon various technical matters to defeat plaintiff's action. Among other things, he says that, as plaintiff did not offer to pay the valid part of the tax at the time of or before he brought his suit, he cannot now be heard to question the certificate. True, plaintiff did not, when he brought his action and filed his petition, make this offer or tender; but, as soon as defendant asserted a right under his certificate he (plaintiff) not only made a tender, but expressed a readiness in his answer to the cross-petition, to pay whatever amount he should be held liable for, and tendered the amount of the valid part of the tax into court, as stated. This is all he was required to do. *Corning v. Davis*, 44 Iowa, 622; *Parker v. Cochran*, 64 Iowa, 757.

Again, it is argued that plaintiff is estopped from questioning the certificate for the reason that Jandrey made no objection to the tax, because the owner paid part of the installments thereof for the reason that the conveyances were made subject to special assessments and incumbrances, and lastly for the reason that no one objected thereto more than 10 years after the assessments were levied. There is no showing that Jandrey had any other notice of the work done, or of the assessment against his property, than the ones usually given for street improvements. As the improvement was unauthorized, and the tax invalid and void, he was not bound to appear before the city council to make objections thereto. *Gallaher v. Garland*, 126 Iowa, 206.

It is not shown that any one under whom plaintiff claims paid any of the installments of taxes assessed against the property. Hence there is no estoppel here. *Fitzgerald v. Sioux City*, 125 Iowa, 396. Had they done so, plaintiff would not be estopped thereby.

1. MUNICIPAL
ASSESSMENTS:
quieting title.

2. OBJECTION TO
ASSESSMENT.

3. ESTOPPEL.

Tallant v. Burlington, 39 Iowa, 543; *Robinson v. Burlington*, 50 Iowa, 240. This is the holding everywhere, as we understand it.

Plaintiff did not take his title subject to all special assessments. The only reference to the matter in any of the deeds in his chain of title is "subject to all incumbrances of record." And this was in the deed of a remote grantor, and, even if binding upon him, would not estop him from questioning an invalid and void tax. The recital, "subject to all incumbrances," without more, does not estop a grantee from pleading the invalidity of any such incumbrances. It means no more than "subject to all valid incumbrances," and was introduced no doubt to avoid action for breach of covenant, express or implied. As the assessment was wholly invalid, neither plaintiff nor any of his grantors was required to bring action to set it aside, nor was he bound to give notice of the invalidity thereof to any one. *Harrison v. Sauerwein*, 70 Iowa, 291.

II. As to defendant's counterclaim: It is argued that he is entitled to recover the value of the improvement on the theory of benefits conferred. As the property could not be made liable for the expense of grading a street, and the attempt to make it so was wholly void, there can be no recovery for benefits conferred. This is fundamental, requiring no citation of authority. As no reassessment could be made, plaintiff's laches in bringing suit should not deprive him of his remedy. The city had no authority to assess the property for the expense of grading the street. *Gal-
laher v. Garland*, *supra*.

The decree seems to be correct, and it is affirmed.

4. DEEDS:
recitals;
estoppel.

5. MUNICIPAL
ASSESSMENTS:
benefits;
laches.

ELOINCE KNUTSON, ET AL., Plaintiffs, v. MARTHA VIDDERS,
ET AL., Defendants.

Wills: CONSTRUCTION: INTEREST OF HEIRS. Where a husband and
1 wife having no children execute a joint will, the husband transferring to the wife the right and authority over their joint property, and in case of her survival a life interest therein with remainder "to be divided equally between our lawful heirs on both sides," the wife's heirs upon her death were entitled to share in one-half of the remaining property so devised by him *per stirpes* and not *per capita*.

Estoppel. Where heirs knowingly accept the proceeds of an unauthorized sale of devised land for full value, they are thereafter estopped from asserting an interest in the land, in the absence of a showing that the money was received under either
2 a misapprehension of their rights or an offer to return the same.

Appeal from Wright District Court.—HON. S. M. WEAVER,
Judge.

THURSDAY, FEBRUARY 9, 1905.

ACTION in equity for partition. After hearing and decree, Martha Vidders and other defendants upon whom notice had been served by publication came in and moved for a retrial, and such was had. The final decree denied any relief to such defendants, and they appeal.—*Affirmed.*

E. H. Addison, for appellants.

C. M. Nagle, for appellees.

BISHOP, J.—The record is somewhat complicated, but therefrom we extract the following facts: Hellick Quinsland, a resident of Wright county, died in October, 1889, testate. His wife, Serene Quinsland, alone survived him; no children

having been born as a result of their marriage. It may also be noted that the parents of both Hellick and Serene had long since been dead. At the time of his death, Hellick Quinsland was the owner in fee of the following described lands in said county, viz.: The south half of the northeast quarter and the north half of the southeast quarter of section 11, and the northwest quarter of section 12, all in township 91, range 26. Said will was duly admitted to probate in Wright county. In the preliminary provision of the instrument, the plural is used, thus: "We, Hellick Quinsland and Serene Quinsland, his wife, hereby make known our last will," etc. So, also, the instrument is signed by both husband and wife. The provision of the will material to the instant controversy is as follows: "I hereby transfer to my wife, Serene Quinsland, the right and authority over our joint property whatever it may be, real or personal, in case she should outlive me, to live on undivided property until her death, the property that is left to be divided equally between our lawful heirs on both sides." Serene Quinsland, the widow, made in writing and filed her election to take under the provisions of the will. Thereafter, and in 1892, heirs of Hellick Quinsland brought proceedings in the district court of Wright county for a construction of the provisions of said will, and thereto the widow and the executor of the estate were made parties defendant. Upon hearing, and in respect of the title to real estate, it was decreed that, subject to the life estate of the widow, the heirs of Hellick Quinsland were the owners in fee of the undivided one-half of said real estate; that the widow, Serene Quinsland, was the owner in fee of the other undivided one-half.

In the year 1894 Serene Quinsland sold and conveyed by deed, with full covenants as to title in fee, etc., the undivided one-half of all the lands to one Folkedahl. To secure the payment of the purchase money, the latter executed and delivered to Mrs. Quinsland a mortgage, covering the lands conveyed, for the sum of \$3,200; being practically the full

purchase price. It seems that judgments had been entered against the heirs of Hellick Quinsland, some or all, and so that in the year 1896 Folkedahl brought an action for partition, making the heirs of Hellick only parties defendant. In said action a decree was rendered making partition, and setting apart to Folkedahl a portion thereof specifically described, and setting apart to the heirs of Hellick Quinsland the remaining portion. Therein it was also decreed that the mortgage above referred to should be a lien only on the portion set apart to Folkedahl, and the judgments referred to should be a lien only on the portion set apart to the heirs.

In January, 1898, Serene Quinsland died testate, and her will was duly admitted to probate in the district court of Wright county. The material provisions thereof will be referred to in the further course of this opinion. The mortgage executed by Folkedahl, and the note secured thereby, passed into the hands of the executor of her estate. Thereafter suit was brought thereon for judgment and to foreclose, and a decree was entered and a sale had under execution. During the year for redemption, the defendant in this action, Ole Thompson, purchased the interest of Folkedahl, and on April 25, 1900, he made redemption from the sheriff's sale, paying the sum of \$5,533. In April, 1900, the portion of the real estate set apart to the heirs of Hellick Quinsland was sold at sheriff's sale under execution to satisfy judgments against them in favor of the State Bank of Jewell.

The present action was commenced in September, 1898, by Eloince Knutson, a sister of Serene Quinsland; making all the other heirs of both Hellick and Serene Quinsland and the said Folkedahl parties defendant. The action is based upon the provisions of the will of Hellick Quinsland, and the prayer is for partition among all the heirs. All of the heirs of Serene Quinsland being nonresidents of the State, service of notice upon them was had by publication. The

other defendants were served with notice personally. The latter only appeared to the action, and issue was joined by the filing of answers and cross-petitions. In the respective cross-petitions the defendant Folkedahl set up the prior proceedings, the conveyance to him, and asserted his ownership of the lands set apart to him by the partition decree. The defendant heirs of Hellick Quinsland likewise pleaded their ownership of the lands set apart to them by such decree. Service of notice on the heirs of Serene Quinsland as to the cross-petitions was also had by publication. A hearing was had, and on December 27, 1898, the court, after adjudging the defendants served by publication to be in default, entered a decree approving the decree theretofore entered, and confirming title in the heirs of Hellick Quinsland to the lands set apart to them by such former decree. And on January 17, 1899, the court entered a further or supplementary decree confirming in Folkedahl the title to the lands conveyed to him by Mrs. Quinsland as against plaintiff and all codefendants.

The will of Serene Quinsland provided for some minor bequests, and then directed the distribution of all the balance of her estate which amounted to about \$3,000, equally between her brothers and sisters living, and the children of those deceased. On May 7, 1900, Martha Vidders and other heirs at law of Serene Quinsland — being the persons designated in the petition in this action as the heirs at law of Serene Quinsland, and made defendants and served by publication as hereinbefore stated — appeared in the district court, and in the matter of the estate of said Serene Quinsland, in probate, and by way of a petition of intervention against the executor, asserted the heirship of each, and that together they constituted all the heirs interested in said estate, and demanding that their right to participate in the distribution of said estate be established. A hearing was had, and on June 12, 1900, an order and decree was made and entered finding the interveners to be the sole heirs of

Serene Quinsland, and that each was entitled to a per capita share in her estate. The executor was ordered to make distribution accordingly. It appears that thereafter, and before final decree in the instant action, distribution of the assets of said estate was made as ordered, and the estate closed. On May 8, 1900, Martha Vidders and the other heirs of Serene Quinsland, defendants in the instant action, appeared therein, alleging that they had been served with notice by publication only, and moved the court that the default decrees entered against them be set aside, and that a retrial of the action be had respecting their several rights and interests in the real estate in question. The motion was sustained, and thereupon said defendants filed answers asserting, in substance, that the will of Hellick Quinsland granted to his widow a life estate only; that, subject to such life estate, the fee title to the real estate of which he died seised under said will became vested in the heirs of himself and his widow, each taking a per capita share thereof; that is, there being seven heirs of Hellick, and eighteen heirs of Serene, each took a one-twenty-fifth interest; further denying that they are bound by the several decrees construing the will of Hellick Quinsland and granting partition; denying that Folkedahl obtained any title in fee under the deed to him, and denying that their interests in the lands were in any way affected by the proceedings of foreclosure and sale under the mortgage executed by him; denying that the heirs of Hellick Quinsland took title under the will in any other portion than a one-twenty-fifth interest in each. By cross-petition, Ole Thompson, grantee of Folkedahl, and the State Bank of Jewell, were brought in as defendants, and each answered. Among other things, each pleads an estoppel based upon the fact that the moneys in the hands of the executor of the estate of Serene Quinsland, and of which distribution was made to the cross-petition plaintiffs, were derived wholly from the foreclosure redemption made by said Ole Thompson.

In the decree as finally entered, the court finds the facts,

and the proceedings based thereon, to be substantially as above stated by us. These further findings of fact are made: That the sale of the undivided one-half interest in the lands by Serene Quinsland to Folkedahl was for the full value of such interest; that Ole Thompson purchased said land for full value, and made redemption in good faith in reliance upon the title as it appeared of record at the time, and that he was a bona fide purchaser for value; that the money in the hands of the executor of the estate of Serene Quinsland for distribution was derived from the proceeds of the foreclosure redemption made by Thompson, grantee of Folkedahl; and that this was known to the complaining defendants, heirs of Serene Quinsland, at the time they made application for the order of distribution of said moneys, and when they accepted and receipted for the same.

There is no merit in the contention of appellants that by the terms of the will of Hellick Quinsland a per capita distribution among the heirs of himself and his wife was intended.

1. **WILLS: con-** The language of the will is, "to be divided
struction; in-
terest of heirs. equally between our lawful heirs on both sides."

Here is conveyed the thought that two parts were in contemplation — one to go to the heirs of the husband, and the other to the heirs of the wife. And this accords with the true etymological significance of the word "between." Webster's International Dictionary. See also, the following cases: *Ross' Ex'r v. Kiger*, 42 W. Va. 402 (26 S. E. 193); *Record v. Fields*, 155 Mo. Sup. 314 (55 S. W. 1021); *Bassett v. Granger*, 100 Mass. 348; *In re Ihrie's Estate*, 162 Pa. 369 (29 Atl. Rep. 750). Moreover, the existing conditions make it probable that the intent of the parties was that distribution should be made per stirpes, and not per capita.

It is manifest from a reading of the decree that the trial court accepted the plea of estoppel, and the evidence offered

2. **ESTOPPEL.** in support thereof, as sufficient upon which to deny relief to the complaining defendants. As we think the record warrants the finding of facts made by the

court, we have no difficulty in reaching the conclusion that the decree was right, and should not, therefore, be disturbed. Whatever may be said of the things done and the various proceedings had prior to the appearance of those who now complain, it certainly cannot be said that they may knowingly take of the proceeds of an unauthorized sale made for full value, and then be permitted to go behind the sale and claim an interest in the land itself. And this especially in the absence of any claim that the money was taken under a misunderstanding of their rights, and of an offer to make return. Equity will not tolerate one in taking positions thus inconsistent and unjust. Authorities are not needed to support our conclusions, but see *Deford v. Mercer*, 24 Iowa, 118; *Rump v. Schwartz*, 67 Iowa, 471; *Lathrop v. Doty*, 82 Iowa, 272; *Leathers v. Ross*, 74 Iowa, 630; *Thompson v. Simpson*, 128 N. Y. 270 (28 N. E. Rep. 627).

It follows from what we have said that the decree should be, and it is, *affirmed*.

WEAVER, J., taking no part.

M. A. NUGENT v. THE CUDAHY PACKING COMPANY,
Appellant.

126 517
137 135

Master and servant: NEGLIGENCE OF MASTER: EVIDENCE. Where

- 1 plaintiff, engaged in repairing in part defendant's building, was injured in following the negligent instruction of defendant's superintendent to lower the same onto a defective brick pier constructed by other workmen, the defendant was liable for the injury in the absence of contributory negligence or assumption of risk. Evidence held to show negligence on the part of the superintendent in directing the work.

Negligence: INSTRUCTIONS. Where an employer was liable for an

- 2 injury to a workman resulting from failure to provide a proper support onto which plaintiff was lowering a building, reference in the court's instructions to a failure to provide a safe place to work, which was explanatory of defendant's duty, was not misleading.

Assumption of risk. A workman, under the direction of the owner
3 of a building, engaged in lowering the same onto supports
constructed by others, does not assume the risk incident to
the defective condition of the supports of which the owner
should have known.

Contributory negligence. A carpenter is not presumed to have a
4 knowledge of the sufficiency of a brick pier to support a building
onto which he is lowering the same, and is not guilty of
contributory negligence in performing the work under the
direction of the superintendent of the owner of the building,
who assumes to know and asserts its sufficiency.

Expert physician: PRIVILEGE: WAIVER. The fact that a physician,
5 called by defendant to examine plaintiff immediately after his
injury, testified on plaintiff's preliminary examination as to
his competency under Code, section 4608, that he found plaintiff
in an unconscious condition, substantially as he had stated
in defendant's prior examination, did not amount to a waiver
of plaintiff's right to object that the witness was within the
privilege of the statute, as the preliminary examination disclosed
no new facts and the same was not affirmative proof of
any material fact for plaintiff.

Appeal from Woodbury District Court.—HON. WM. HUTCH-
INSON, Judge.

THURSDAY, FEBRUARY 9, 1905.

ACTION to recover damages for personal injuries received by plaintiff while in defendant's employ. Verdict and judgment for plaintiff in the sum of \$1,999 and costs. Defendant appeals.—*Affirmed.*

M. L. Sears, for appellant.

Hubbard & Burgess and *F. E. Gill*, for appellee.

MCCLAIN, J.—At the time of receiving the injury complained of, plaintiff was in defendant's employ as a carpenter, and was in charge of workmen engaged in the general business of repairing an old building. The entire work was being done under the supervision of one Casey,

who was defendant's general superintendent for the work. The particular work being done at the time of the accident by plaintiff and the men under his charge was that of letting the weight of the upper floors down upon a post resting on a new brick pier which had been constructed by other workmen to support such post and the weight of the floors resting upon it. During the construction of the pier the floors had been raised and held up by means of jack-screws. The pier, constructed of brick and cement, had been completed on Saturday; and, on Monday following, plaintiff went with his men for the purpose of letting the weight of the building down upon the pier. Water had accumulated around the pier, and plaintiff, being apprehensive that the cement was not sufficiently set, tried some of it with his fingers, and, finding it still soft, consulted Casey as to what he should do; expressing a fear that the pier was not solid enough to support the weight which was to be put upon it. Casey expressed an opinion that the cement in the interior of the pier was sufficiently set, and directed plaintiff to proceed with the work. Thereupon the jack-screws supporting the weight of the floors above were simultaneously loosened, so that the weight was thrown on the supporting post resting on the pier. At this time there was a "chuck," or creaking noise, and immediately afterward plaintiff was struck by one of the pieces of the bridging; that is, one of the short cross-pieces (a stick two by four inches in size and eighteen inches long) placed between the joists to support the flooring. The injuries complained of resulted from this accident.

The negligence alleged was that of Casey, the superintendent, in directing plaintiff and those under his charge to remove the jackscrews supporting the floors above, and thereby causing the timbers in the floors to settle and become dangerous and unsafe, and also the negligence of defendant in failing to furnish plaintiff a reasonably safe place to work, in that the place for performance of plaintiff's work was made dangerous and unsafe by the order of the super-

intendent. The principal contentions for appellant are that, as plaintiff was engaged in the work of repairing, there was no obligation on the part of defendant to furnish him a safe place to work; that plaintiff assumed the risk incident to the work being done; and that he was guilty of contributory negligence. With reference to each of these principal contentions, complaint is made as to the instructions of the court, and failure of the court to direct a verdict for defendant on motion, or to set aside the verdict as without support in the evidence. It will not be necessary to set out the particular instructions or rulings complained of, for the errors urged by appellant relate rather to the theory on which the case was tried, than to specific errors committed, and we can satisfactorily dispose of the case by pursuing the method of treatment adopted by counsel for appellant in his argument.

I. It is conceded that the pier was not constructed under plaintiff's direction, but by workmen composing a separate force, and engaged in a different department of the work, and that if the fall of the bridging was due to the giving way of the pier, and there was negligence on the part of defendant's superintendent in directing plaintiff to let down the weight upon it, then, omitting any question for the present as to the assumption of risk or contributory negligence, defendant was liable for the injury to plaintiff. It is argued that the evidence shows the fall of the piece of bridging to have been due to the lowering of the floors above by letting down the jackscrews, and not by the giving way of the pier. But the evidence clearly tended to show that it was not until the jackscrews had been completely let down, and some of them removed, so that the weight rested entirely on the pier, that there was a sudden noise, indicating that it was giving way, and that the fall of the piece of bridging resulted from the settling of the post, due to this giving way of the pier. It was for the jury to say what was the cause of the falling

1. NEGLIGENCE
OF MASTER:
evidence.

of this piece of bridging, and whether it was the proximate result of the giving way of the pier, due to the negligent order of Casey to let the weight down upon it before the cement had sufficiently hardened to support the weight. There was evidence tending to show that, as Casey should have known, the cement in this pier would not become sufficiently fixed in two days to justify the throwing of the weight of the floors upon it; that it would continue to harden for a long time; and that it would not become strong enough to support such a weight in less than from five to ten days. Therefore, without regard to any question of the duty of defendant to furnish plaintiff a safe place to work, there was a direct showing of negligence on the part of Casey, as defendant's superintendent, in directing an act to be done which proximately caused the accident of which plaintiff complains; and it was substantially on this theory that the case was submitted to the jury.

It is true that the court, in an instruction, refers to the duty of defendant to provide its employ  s with a reasonably safe place to work; but that language is used as explain-

ing Casey's duty in regard to the sufficiency
2. NEGLIGENCE: of the pier, and the jury could not have been
instructions. misled in this respect. Certainly, if the place where plaintiff was properly standing in the discharge of his duty was rendered unsafe by negligently allowing the weight of the floors above to come upon this pier, which was not sufficiently strong to support such weight, then defendant was liable, in the absence of any assumption of risk or contributory negligence on plaintiff's part; and it is quite immaterial whether this liability was described as failure to provide a sufficient support for the weight, or as failure to supply a reasonably safe place for plaintiff to work.

II. Counsel for appellant invokes the rule that a workman engaged in work inherently hazardous assumes the risk, and cannot recover for injury resulting from the very defect which he is employed to repair, and relies on the case of

Wahlquist v. Maple Grove Coal & Mining Co., 116 Iowa, 720, and cases therein cited. But it was not

3. ASSUMPTION
OF RISK.

the danger of the falling of the piece of bridging that plaintiff was engaged in obviating, and it does not appear from the evidence that the piece of bridging would have fallen, had not the weight of the floors above been thrown on the pier before it was sufficiently strong to support such weight; and, as has been indicated, plaintiff had no responsibility with reference to the pier. He may have assumed the risk incident to raising the floors on jackscrews and letting them down again until their weight should be supported by the pier; but there is nothing to charge him with the assumption of risk as to its sufficiency, or any danger accompanying its giving way. As above stated, the evidence tends to show that it was the giving way of the pier, and not the lowering of the floors by letting down the jackscrews, that caused the piece of bridging to fall.

III. The act of the plaintiff in proceeding with the work of letting down the weight of the floors above on the pier, with knowledge that the cement was still soft, is relied upon as constituting contributory negligence on

4. CONTRIBUTORY
NEGLECTANCE.

plaintiff's part. But plaintiff was a carpenter, only, and not presumed to have knowledge as to the sufficiency of the pier, depending upon how soon the cement would become sufficiently strong to support the weight thrown upon it. Casey assumed to know that the cement in the interior of the pier was sufficiently set, so that it would support this weight. Plaintiff was clearly justified in relying on Casey's judgment in this matter, and was not guilty of contributory negligence in proceeding with the work after the assurance of Casey that it would be safe to do so. In this connection a further argument of counsel for appellant may be noticed. He insists that plaintiff had reason to know that the bridging was loose, and in a condition threatening danger to him, before the accident happened, and that he was guilty of contributory negligence, at any rate, as to any

risk incident to the condition of the bridging. But as to this matter the testimony is in conflict, and it was for the jury to say whether there was a dangerous condition, known to plaintiff, of which he should have been aware, which contributed to the accident. We cannot say, as a matter of law, under the evidence, that the accident was due to a danger which plaintiff knew or should have known to exist.

IV. One ruling on the admission of evidence remains to be noticed. A physician who visited plaintiff immediately after the accident was put upon the stand by defendant, and testified that he was called by the defendant

5. EXPERT PHYSICIAN: privilege; waiver.

to examine the plaintiff when he was hurt, and that he found him lying on a table, seemingly unconscious. Counsel for plaintiff then asked permission to interrogate the witness for the purpose of laying a foundation on which to object to his giving testimony as to the examination which he made of the plaintiff. In the course of preliminary questions with reference to his employment by defendant, the witness was allowed, over defendant's objection, to say that, during a considerable portion of the time during which the examination was made, plaintiff was unconscious. Counsel for plaintiff then objected that the witness was incompetent to testify as to the result of his examination, as such testimony would be within the privilege provided for by Code, section 4608. Counsel for defendant insisted that as the witness had already testified, in answer to the preliminary questions propounded by plaintiff's counsel, that plaintiff was unconscious when the examination was made, plaintiff had waived the objection to the competency of the testimony of the witness, and asked to be allowed to interrogate him further; but the court sustained plaintiff's objection to further testimony by the witness as to plaintiff's condition. As to this, complaint is made. In the first place, the fact that plaintiff was unconscious was disclosed by the witness' testimony in response to the questions first proposed by the defendant, and what was said in response to the preliminary

questions asked by counsel for plaintiff practically went no further. In the second place, what was said as to the condition of plaintiff seems to have been called out for the purpose of determining whether plaintiff had consciously accepted the witness as his physician. Whether or not this was material, we need not decide, for what the witness said in answer to the preliminary questions could not be regarded as affirmative evidence of a material fact on plaintiff's behalf, and therefore was not a waiver of plaintiff's objection to the witness' further testimony as to the plaintiff's condition. The ruling of the court could not possibly have prejudiced the defendant, and cannot, therefore, be made a ground for reversal.

The judgment of the trial court is *affirmed*.

MAE SCOTT as Administratrix of the Estate of HARVEY D. SCOTT, Deceased, Appellee, v. THE IOWA TELEPHONE COMPANY, Appellant.

Telephones: NEGLIGENCE OF FELLOW SERVANT: EVIDENCE. In an action for the death of an employé of a telephone company caused by his coming in contact with a wire charged with electricity, through the negligence of a fellow servant sent to repair the wire, the evidence is reviewed and held to sustain a finding that the fellow servant was incompetent and that defendant had knowledge thereof.

Negligence: INCOMPETENCY OF FELLOW SERVANT: LIABILITY OF MASTER. An employer in dealing with highly charged electric wires, is held to great care in protecting his servants from injury therefrom, and is not excused from responsibility for the death of a servant caused by the negligence of an inexperienced fellow servant to whom he had intrusted the work of repairing a defective live wire, by the mere fact that he did not know of such servant's incompetency.

Assumption of risk. A servant does not assume the risk arising from the negligence of the master in employing an incompetent fellow workman.

Appeal from Woodbury District Court.—HON. WM. HUTCHINSON, Judge.

THURSDAY, FEBRUARY 9, 1905.

THE opinion states the case.—*Affirmed.*

A. Van Wagenen, for appellant.

Hallam & Munger, for appellee.

WEAVER, J.—Henry D. Scott was in the employ of the Iowa Telephone Company at Sioux City, Iowa. He had had some experience with handling and caring for telephone wires carrying electric currents of comparatively slight force, but does not appear to have been familiar with work in connection with more powerful currents. On May 23, 1903, one of the wires in the appellant's system on Myrtle street in said city had become broken, and fell across a heavily charged electric light wire. The free end of the broken strand hung down near the ground, and created a manifest source of peril to persons using the street. On Scott's passing near the place, some one called his attention to the broken wire, and he proceeded, as was his duty, to repair the break, or at least secure the free end of the wire. About this time it would seem that some one had reported the break to the defendant's office, and the agent in charge sent one Ingledue, a young man in the company's employ, to remedy the trouble. As Ingledue came up, Scott had obtained a piece of dry rope, which is a nonconductor, and wound it about the broken wire, for the purpose, evidently, of pulling it away from its contact with the electric light wire, and thus render it harmless. Just the course of action then pursued by Scott and Ingledue is a matter of considerable dispute between the witnesses. The evidence on part of plaintiff tended to show that Scott had begun to pull upon the rope, when Ingledue stepped in, and attempted to cut the wire with a pair of

nippers held in his hand. As soon as the nippers touched the wire Ingledue received an electric shock causing him to fall and jerk the wire against the person of Scott, who thus received a fatal stroke. It was the claim of defendant that Scott, by his own carelessness or misfortune, had already come in contact with the wire, and called to Ingledue to cut it and release him, and that it was only upon such call that the latter made use of the nippers. This conflict of testimony was fairly submitted to the jury, which found against the defendant, and we must accept the plaintiff's version as the correct one. For damages thus accruing the administratrix of Scott's estate brings this action. The petition charges defendant with negligence in several particulars, all of which were by the trial court withdrawn from the consideration of the jury, except the allegation that Ingledue was a young, inexperienced, and incompetent person for such work as he was sent to perform on the occasion in question, and that defendant did not use due or reasonable care in placing such work in his hands, and that by reason of his incompetence and lack of reasonable skill the live wire had been brought against the person of Scott, causing his death. There was a verdict for plaintiff in the sum of \$7,000, and from the judgment entered thereon the defendant has appealed.

The five different reasons assigned by appellant for a reversal of the judgment of the district court may be embodied in the one proposition that the evidence is not suffi-

1. NEGLIGENCE
OF FELLOW
SERVANT:
evidence.

cient to sustain the verdict. It is said that there is no showing of Ingledue's lack of qualification for the work he was sent to perform.

But this is not correct. Experienced witnesses testified without objection that they knew him well, knew his experience and capacity, and that he was not competent for work of this nature. This estimate is confirmed by the further showing that Ingledue was at this time only 20 years old, and, while he had been in the service of defendant for a considerable period, his work was principally in the office, and

not of a kind to fit him especially for dealing with broken and dangerous wires. Nor can the defendant be excused from liability on the plea suggested by counsel that it does not appear that defendant had notice of his incompetency. In the first place, he had been for several years in the company's service, and it had ample opportunity to know his qualifications.

Moreover, the defendant, in dealing with highly charged electric wires was making use of the most subtle and dangerous power known to mankind, and was bound to exercise

2. **NEGLIGENCE:** corresponding care to avoid bringing destruction to its servants whose duties brought them within the zone of danger. True, he who undertakes service of this kind assumes such risks as are

naturally and necessarily incident thereto; but in this as all other employments the master undertakes to use all reasonable care to provide a safe place to work, and to furnish a sufficient number of competent employes to properly and safely execute the work in hand. In handling electricity, or in exposing men to its currents reasonable care is great care; and if the master, by placing responsibility upon inexperienced and untried persons, brings injury or death to his employes, the mere fact that he did not know of such person's incompetence will not relieve him from liability.

Failure of the master to do his duty in this respect is not a risk which the servant assumes. In the case before us there is no claim that defendant employed Ingledue as an

3. **ASSUMPTION OF RISK.** experienced electrician, or that it supposed or believed him to have any experience except such as he had obtained in its service. Of that serv-

ice it was well advised, and, if he was incompetent, it must be charged with notice of the fact. The cases cited by counsel, where a single act of negligence is held not to be notice to the master of the servant's unfitness for his position, are not in point. It is not claimed here that Ingledue was unfit for the work because of habits of negligence, but because he had

not yet had the experience and training to render him competent for such service, and of this there was ample evidence to sustain the plaintiff's contention.

We shall not go into a review of the controversy between witnesses as to what occurred between Scott and Ingledue, to which we have already made reference. It is enough to say that, if the jury believed the plaintiff's witnesses, as it had the right to do, it was justified in finding that the catastrophe occurred substantially as charged in the petition. It was also shown that the nippers made use of by Ingledue were but slightly insulated, and that no prudent person of experience would use them upon a wire carrying a dangerous current. It was conceded upon the trial that upon the report of the broken wire reaching the defendant's office the linemen usually sent out upon such service were not at hand, and the wire chief directed Ingledue to go. If, then, Ingledue was incompetent, and defendant was chargeable with notice of the fact, and the latter, by his lack of ordinary experience, brought the deadly wire in contact with Scott's person without fault on his part (and of all this there was evidence), the plaintiff was entitled to recover. Such is the verdict of the jury, and we cannot disturb it.

The judgment of the district court is *affirmed*.

W. N. PRIMM V. WISE & STERN, Appellants.

Sale of land: RESCISSION OF CONTRACT. Where time is of the essence
 1 of a contract to convey land, plaintiff, to establish his right to rescind for defendant's default, must prove that he was ready, able, and willing to perform his part and made substantial tender of performance on the date specified.

Rescission of contract: TENDER. Where defendants were not
 2 ready, able, and willing to perform their contract for the conveyance of land at the time specified, and plaintiff tendered a draft for the amount of a cash payment to which no objection was made, and nothing was said regarding a mortgage to be

126 528
 127 221
 e127 276
 f127 277
 127 625

126 528
 132 385
 132 386
 f132 387

126 528
 134 388

126 528
 141 405
 141 572

given for deferred payments, such tender was sufficient to support plaintiff's suit to rescind.

Rescission. Where defendants, having only an option to purchase, 3 land, agreed to convey it at a specified time under a contract of which time was the essence, and they were unable to procure title on that date, such breach of the contract entitled their purchaser to rescind.

Rescission: CURING DEFECTIVE TITLE. A contract providing that vendors shall have a reasonable time after tender of an abstract to remedy defects in the title, does not contemplate a complete absence of title and delay for the purpose of procuring the same.

Rescission: TENDER OF PERFORMANCE. Where plaintiff, under a 5 tract to purchase real estate, knew that defendants had no title on the date specified for performance and that they were unable to perform, it was necessary for him before rescinding to make a technical tender of performance, provided he was ready, able, and willing to perform had defendants been able to do so.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FRIDAY, FEBRUARY 10, 1905.

ACTION commenced at law to recover \$2,000, paid by plaintiff to defendants on a contract of defendants to convey certain land to the plaintiff, which it is alleged defendants were unable to convey at the time specified in the contract, whereupon plaintiff rescinded the contract, and demanded the return of the payment already made. Defendants relied upon failure of plaintiff to tender performance of the contract at the time specified, and alleged their own readiness and ability to perform, and asked that either the contract be specifically enforced as against plaintiff, or that they have damages for its breach. The case was, by consent of parties, tried in equity, and a decree was rendered for plaintiff for the return of the money paid by him, with interest. Defendants' counterclaim was dismissed. Defendants appeal.
— *Affirmed.*

Henderson & Fribourg, for appellants.

J. A. Penick, Stuart & Stuart, and *Charles A. Dickson*,
for appellee.

McCLAIN, J.—The contract of defendants to convey certain specified land in Missouri to the plaintiff, then a resident of Iowa, was made on the 10th of September, 1902, defendants purporting to act, however, as agents of an undisclosed principal, and subject to the owner's approval. By its terms \$2,000 cash was to be paid on the execution of the contract, and the receipt of that amount was acknowledged. It was provided that on February 1, 1903, the plaintiff should make a further payment of \$3,100, assume a mortgage of \$2,400, and give a mortgage back for the balance of the purchase price (\$4,500); and that the defendants should convey, or cause to be conveyed, the tract of land described, to the plaintiff, furnishing him "an abstract of title, showing from them, or from whom the deed is to come, a good merchantable title." The plaintiff was also to have ten days in which to examine the title and return the same to the defendants, together with his objections, which the defendants should have a reasonable time thereafter to cure, the nature and kind of objections to be taken into consideration in the length of time to be given to the defendants for curing and remedying the same. It was also provided that possession was to be given to the plaintiff on the 1st day of February, 1903.

It is conceded that by the terms of the contract the time of performance was of its essence, and therefore plaintiff, in order to establish his right to rescind for failure of defendants to perform on the date specified, must

1. RESCISSION OF CONTRACTS. show that on that date he was ready, able, and willing to perform on his part, and made a substantial tender of performance, and that defendants refused or were unable on that date to substantially perform

the contract on their part. *Davis v. Stevens*, 3 Iowa, 158; *Iowa Railroad Land Co. v. Mickel*, 41 Iowa, 402; *Johnson v. Thornton*, 54 Iowa, 144; *Pomeroy*, Specific Performance, section 340.

The place fixed for the performance of the contract was at the office of defendants in Kansas City, and as the 1st of February, the date of performance named in the contract, fell on Sunday, plaintiff appeared there on Saturday, having with him a draft for \$3,100, the amount of the cash payment to be made on that date, and professed to be ready to carry out the contract. He had already learned, however, that the land belonged to one Mrs. Gaines, for whom her husband seemed to be acting as agent; and during the day plaintiff sought out Mr. Gaines for the purpose of negotiating with him for the purchase of such feed as there might be on the farm. Gaines, however, declared that he and his wife would not surrender possession of the premises nor execute a deed thereto until March 1st, whereupon plaintiff took Gaines with him to defendants' office for the purpose of having the situation as to the title and right of possession of the farm cleared up. After a private interview with Gaines, one of the defendants admitted that he was not ready to make or secure a deed at once. There were further negotiations between the parties, and it appeared by a preponderance of the evidence that plaintiff still professed on the 2d of February, at defendants' office, to be able and willing to carry out the contract on his part, provided defendants were ready to perform on their part.

As to the sufficiency of plaintiff's offer of performance, defendants claim that a cash tender of payment was not made, and that no mortgage for the deferred payment was offered by plaintiff. But it is sufficient answer to these objections to say that defendants did not express any objection to the acceptance of the draft which plaintiff had in his possession and exhibited to them, nor did they make any inquiry as to whether plaintiff was

2. RESCISSION OF
CONTRACT:
tender.

ready to execute the mortgage. In fact, nothing whatever was said about the execution of the mortgage on either side. The whole difficulty between the parties was as to whether defendants were ready and able to carry out the contract on their part if plaintiff should perform his obligations; and it became clear to the plaintiff on the 31st of January, and continued to be evident until the evening of the 2d of February, when his last interview with defendants ended, that defendants were not able to make conveyance or to give possession at that time.

The facts about defendants' ability to make title and transfer possession are substantially these: Prior to the execution of the contract with plaintiff, defendants had made a contract with Mr. and Mrs. Gaines, by which, in consideration of a cash payment and a promise to pay the balance of the purchase price on or before March 1, 1903, Gaines and his wife agreed to convey the property and give possession thereof to these defendants on or before that date. Some point is made as to the effect of the stipulation that the deed would be made and possession given "on or before March 1st," and it seems to be claimed for defendants that they were entitled to the possession and the deed on February 1st, should they demand it, and pay the balance of the purchase price. But there is nothing in the contract to justify such a construction. It was not stipulated that Gaines and wife would surrender possession to defendants before March 1st, if demanded, and the balance of the purchase money paid. And, plainly, defendants were not in a situation to compel performance of the contract until March 1st. It appears, therefore, that defendants had agreed in a contract, in which time was the essence, that on the 1st day of February they would transfer possession, and make or cause to be made a deed which would convey complete and absolute title to the plaintiff, while on that date they had simply an executory contract for the purchase of the land from Gaines and his wife, under which they were not entitled to possession and

a deed until one month later; and, furthermore, it was made known to both the plaintiff and the defendants on January 31st that Gaines and his wife would refuse to surrender possession or make a deed until the 1st of March. The defendants were not ready and able to carry out their contract with plaintiff either on the 31st day of January or on the 2d day of February, and plaintiff was not bound to go further than he did go in making a tender of the money or offering to execute and deliver the mortgage for the deferred payment.

Counsel for defendants rely on evidence tending to show that plaintiff on the 2d day of February was not willing and ready in good faith to carry out the contract on his part,

but was seeking to secure a technical advantage,
3. RESCISSION. and that he refused to allow to defendants any opportunity to arrange with Gaines and his wife for transfer of title and possession, and that when defendants offered to secure title and possession for him, and professed their confidence in their ability to do so, he told them that it was too late. But they did not pretend that they could give title and possession on that day, nor that there was any reasonable ground for belief that such transfer could be secured until March 1st. Plaintiff was justified in declaring that it was too late to consider any further offers or proposals in view of the confessed inability of the defendants to carry out the strict terms of the contract on their part.

It is also urged that by the contract defendants were to have a reasonable time after the abstract was tendered to the plaintiff to cure any defects therein for the purpose of showing a perfect title in the defendants, and that,

4. RESCISSION: curing defective title. if objection had been properly made to the defects in the title, the defendants could, within

a reasonable time, have remedied them by securing title and possession from Gaines and his wife. But the stipulation in the contract with reference to the defects in title which should appear by the abstract was clearly not intended to refer to a complete absence of title on the part of the de-

fendants and an entire inability on their part to carry out the contract.

Counsel say that by the law of Missouri defendants, under the contract with Gaines and wife, "had a title which was only defective in that conveyance had not yet been made."

But this is evidently an after-thought. It was not an equitable title, or a right to acquire title, which defendants agreed should be transferred to the plaintiff on the 1st of February, but a full and complete legal title to the premises. If defendants had in fact at that time had such title, but for some technical reason the abstract failed to show it, they no doubt would have been entitled under their contract to a reasonable time in which to perfect the abstract. But in fact they did not have title, either apparent or real. They had merely a contract, by which, on the 1st of March they might acquire title on the payment of the balance of the purchase price of the property a very small part of which had been paid by way of advance payment when their contract with Gaines and wife was made. In short, their equitable interest in the property on the 1st of February was to the extent of an advance payment of \$500 out of a total of \$8,000 purchase price. Therefore they were not in a situation to carry out the contract, and plaintiff was entitled to rescind. *Burks v. Davies*, 85 Cal. 110 (24 Pac. Rep. 613, 20 Am. St. Rep. 213). Defendants were not entitled to a reasonable time in which to procure title. They should have been ready to convey a good title when plaintiff proposed, on the day fixed by the contract, to perform on his part. *Bartle v. Curtis*, 68 Iowa, 202; *Goetz v. Walters*, 34 Minn. 241 (25 N. W. Rep. 404); *Gregory v. Christian*, 42 Minn. 304 (44 N. W. Rep. 202, 18 Am. St. Rep. 507). In view of his knowledge of defendants' inability to perform, it was not incumbent upon plaintiff, before rescinding, to make a technical tender of performance on his part. If he was then willing to perform, and might have performed had defendants been able to carry out the con-

5. RESCISSION:
tender of per-
formance.

tract, he was justified in rescinding on account of the breach of the contract. *Hopwood v. Corbin*, 63 Iowa, 218; *Clark v. Weis*, 87 Ill. 438 (29 Am. Rep. 60); *White v. Mann*, 26 Me. 361.

The decree of the trial court is correct, and it is *affirmed*.

DELLA T. EIGHMY, Appellee, v. L. W. BROCK, Appellant.

Fraudulent conveyances: BURDEN OF PROOF: EVIDENCE. A step-
1 father who obtains from his step-daughter barely eighteen years of age and while a member of his family, a conveyance of her interest in real property for an inadequate consideration, has the burden of negating the presumption of fraud and undue influence. The conveyance in question was obtained under circumstances entitling plaintiff to equitable relief.

Fraud: RATIFICATION. The act of a grantor in a conveyance ob-
2 tained by fraud, which does not amount to an intelligent assent to the conveyance after knowledge of the fraud, will not constitute a ratification.

Fraudulent conveyances: RECOVERY OF CONSIDERATION. Where a
3 conveyance of an undivided one-third interest in land has been set aside as fraudulent, the plaintiff is entitled to recover one-third of the value of the whole tract.

Same. Where defendant gave a note in consideration for a con-
4 veyance procured by him through fraud and afterward discounted the same, on cancellation of the conveyance he was only entitled to credit for the actual amount paid for the note.

Appeal from Taylor District Court.—HON. H. M. TOWNER,
Judge.

FRIDAY, FEBRUARY 10, 1905.

THE opinion states the case.

Flick & Jackson, for appellant.

Haddock & Sons, for appellee.

WEAVER, J.—On March 2, 1890, one John Owens died intestate, seised of a farm of one hundred and sixty acres in Taylor county, Iowa. His widow, Electa Owens, and two minor daughters, Ethel E. and Della T., the plaintiff herein, were the only heirs and beneficiaries of his estate, each becoming entitled to a one-third part. On August 8, 1895, the widow was married to L. W. Brock, the defendant. The plaintiff remained a member of the family until her marriage in January, 1903. At the date of the mother's marriage with Brock, plaintiff was about twelve years of age, and arrived at her majority October 22, 1901. Eight days later she united with her mother in conveying their respective interests in the land to the defendant. In consideration of the conveyance by plaintiff, defendant made to her his promissory note for \$1,000, due six years after date without interest. On September 30, 1902, defendant discounted and took up his note; the total amount paid to the plaintiff in discharge of said obligation being \$694.53. The plaintiff now alleges that the said conveyance was obtained by artifice, fraud, and undue influence; that defendant took advantage of her youth and inexperience, and of her dependent situation as a member of the family, and by such means, and by misrepresentations as to the value of her interest in the land, induced her to part with it for a grossly inadequate consideration. She tenders a return of the money received by her, and asks to have the conveyance canceled, and that she have an accounting for the rents and profits received by the defendant.

The defendant denies all charges of fraud and wrong on his part, and alleges that plaintiff has ratified the conveyance, and cannot be heard to ask for its cancellation. The trial court found for the plaintiff upon the issues of fact. The decree entered permits the defendant to retain the title to the land, but requires him to account and pay therefor at its proved value. The value of the entire farm is placed at \$8,000, one-third of which would be \$2,666. But the court finds that the interest of the plaintiff, being undivided, is

therefore worth something less than its full fractional part of the value of the land as a whole, and, for this reason, discounts or reduces the estimated value of the one-third to \$2,466. This sum, increased by plaintiff's share of the rents and profits, makes up an aggregate of \$3,426, for which the defendant was required to account. Against this sum the court allowed him credit for improvements made and incumbrances paid off, \$866, and the face of the note for \$1,000 which he had given to plaintiff, leaving a remainder of \$1,560, for which judgment was entered in plaintiff's favor, and made a charge upon the land. From this decree the defendant first perfected an appeal. The plaintiff also appeals from so much of said decree as reduces or discounts the value of the undivided third of the land by the sum of \$200, and from the provision which charges her with the full face of defendant's note, instead of the sum actually paid by him in discharge of the debt.

It will be seen from this statement that the question presented is principally one of fact, and, without reviewing the testimony generally, we have to say we agree with the

1. **FRAUDULENT CONVEYANCES:** trial court in its conclusion that the conveyance in question was obtained in a manner and under circumstances which clearly entitle plaintiff to equitable relief. The plaintiff was an inexperienced girl, and a member of the defendant's family. That the defendant had for some time harbored the purpose of obtaining the land is proven, and that immediately upon plaintiff's arrival at the age of 18 years, and while she was still an inmate of his household, he took the deed in controversy, is not denied. Conveyances made under such circumstances are viewed by the courts with distrust, and the parent or guardian who seeks to profit by such a transaction assumes the burden of negating the inference of fraud and undue influence. *Chidester v. Turnbull*, 117 Iowa, 168; *Mallow v. Walker*, 115 Iowa, 238; *Harper v. Kissick*, 52 Iowa, 733. Under the record here presented, it cannot be doubted that

defendant obtained the property at a grossly inadequate consideration — an inadequacy which was materially augmented by the act of defendant in obtaining the plaintiff's acceptance of a note payable six years in the future, without interest, and soon thereafter paying the same at a discount of more than \$300. Moreover, we think the record shows that defendant misrepresented to the plaintiff the value of her interest in the property, and that he was aided in the accomplishment of his purpose by advice of his wife given to her daughter to accept his offer, and thereby avoid domestic discord.

The claim of the defendant that, by accepting the money on the note some months after the conveyance, plaintiff ratified the sale, cannot be sustained. She was then still a member of defendant's family, and was less than 19 years of age; and, while the feeling between her and defendant had been somewhat unpleasant, over matters having no connection with property rights and interests, there is nothing to show that she at this time knew or realized that she had been overreached in the deal with her stepfather. Ratification presupposes the withdrawal of the undue influence, and a free, intelligent assent to the contract by the person against whom it is asserted, after knowledge of the real nature of the transaction is or ought to be known to such person. 2 Pomeroy's Equity Jurisprudence, section 964. We are therefore satisfied that the defendant's appeal cannot be sustained.

Upon the plaintiff's appeal, we are of the opinion that no good or equitable reason exists for permitting the defendant to have credit for a full \$1,000, when the full amount of his payment was but \$694.53. If, as the court below well found, the defendant was properly chargeable with fraud in obtaining this conveyance, no one circumstance connected with the deal affords more convincing support to that finding than is found in the fact that, after convincing plaintiff that \$1,000 was

2. FRAUD: rati-
fication.

3. FRAUDULENT
CONVEYANCES:
recovery of
consideration.

a fair compensation for her property, he procured her acceptance of a promissory note having a present value of less than \$700. To permit him now to take credit for \$1,000 is to permit him to profit by his own wrong, at the expense of the person whom we find entitled to relief against it.

Neither do we coincide in the view that if the land was worth \$8,000 — and this is certainly a low estimate, under the testimony of the witnesses — the value of the interest of the plaintiff's one-third should be estimated at anything less than one-third of that sum. While one witness, on being pressed by counsel, said that he thought the value of a fractional interest was less than a like fraction of the value of the whole, he offers no reason or explanation therefor; and, in our judgment, it does not afford sufficient ground on which to sustain the order of the court in this respect.

It follows that the decree of the district court must be affirmed on the defendant's appeal, and reversed on the appeal of the plaintiff. At the election of the plaintiff, decree will be entered in this court increasing the amount of her recovery from the defendant by the sum of \$505.47, as of the date of the original decree. The costs of the appeal are taxed to the defendant.

Affirmed on defendant's appeal. *Reversed* on plaintiff's appeal

O'BRIEN COUNTY, Appellee, v. BERNHARD I. MAHON, Defendant, and THE AMERICAN BONDING AND TRUST CO. OF BALTIMORE, MD., Appellant, and BERNHARD I. MAHON, HENRY GUND, THE JOHN GUND BREWING CO., defendants in Cross-petition.

Intoxicating liquors: BONDS: SUFFICIENCY. A liquor dealer's bond
1 providing for a compliance with the laws of the State is valid, although the statute in force at its execution was repealed or superseded by the Code of 1897; and the bond would be good as a

common law obligation even though not in conformity with the statute.

Mulct tax: LIABILITY OF SURETIES. The sureties on a saloon keeper's bond are liable for the payment of the mulct tax.

Same. The sureties on a liquor dealer's bond cannot escape liability for the mulct tax on the ground that by failure of the principal to pay the tax he is no longer operating under the law.

Same. Mere failure to collect a mulct tax when due will not discharge the sureties on a liquor dealer's bond.

Same. The sureties on a liquor dealer's bond are liable for the full tax for the quarter in which the obligation arose.

Same. Failure of a liquor dealer's bond to describe the place where the business is to be conducted, will not invalidate the same.

Interest. Interest may be recovered in a suit on a liquor dealer's bond.

Bond: CONSIDERATION. A liquor dealer's bond given to secure immunity under the mulct law, which is accepted as sufficient and operated under, is supported by a sufficient consideration.

Recovery of mulct tax. The county may recover the entire mulct tax, though one-half is to go to the municipality.

Same. A county may recover from the sureties on a liquor dealer's bond without first exhausting the property of the principal.

Appeal from O'Brien District Court.—HON. JOHN F. OLIVER, Judge.

FRIDAY, FEBRUARY 10, 1905.

ACTION to recover a mulct tax from the sureties on the bond of one Mahon, who was engaged in conducting a saloon in the town of Sanborn, in O'Brien county. The bonding and trust company interposed various defenses, to some of which we shall refer during the course of the opinion; and it also pleaded what it called a cross-petition in equity against Mahon, Henry Gund, and the John Gund Brewing Company, wherein it asked that, if plaintiff obtained judgment against it, the amount thereof be declared a lien upon the property whereon the saloon had been conducted,

that plaintiff be required to sell this property before resorting to this defendant, and that special execution against the property be issued in its favor for the amount of any judgment rendered against it, and that it have judgment against Gund and the Brewing company for any amount found due the plaintiff, and for general relief. Various other matters were pleaded in an amendment to this cross-petition, which need not be referred to at this time. To the cross-petition and the amendment thereto demurrers were filed, which eliminated them from the case. A jury was waived, and the case was tried to the court, resulting in a judgment for plaintiff against Mahon and the Bonding and Trust company, and the Bonding and Trust company appeals.— *Affirmed.*

Cory & Bemis, for appellant.

Joe Morton, for appellee county.

C. A. Babcock, for appellees Gund and Gund Brewing Co.

DEEMER, J.— The pleadings are very voluminous and complicated, covering more than 20 printed pages of the abstract, and we shall not attempt to set them out *in extenso*. The case was tried upon an agreed statement of facts, which, so far as material, are as follows: Bernhard I. Mahon was conducting a saloon under the so-called "Mulct Law" at Sanborn, in the county of O'Brien, during the year 1901, and on April 15th of that year he filed a bond with the Bonding and Trust company as sureties, conditioned that he (Mahon) "should faithfully observe and comply with all the provisions of the laws of the State of Iowa relating to the keeping and selling of intoxicating liquors; and especially with the requirements of the act of the 25th General Assembly [page 63, chapter 62] known as an act to tax the traffic in intoxicating liquors, and to regulate and control the same, and shall pay

all damages that may result from the sale of intoxicating liquors upon the premises occupied by Mahon." Mahon failed to pay the mulct tax for the quarters ending June 30 and September 30, 1901, of \$300. This action was to recover said tax, with interest and penalties, from Mahon and the surety on his said bond. The action in so far as the penalties are concerned was dismissed by the plaintiff, and we shall have no occasion to consider that matter further. Judgment was rendered against Mahon and his surety, for the amount of the quarterly taxes, with interest, and the appeal is from that decision.

Appellant's argument does not comply with our present rules, and we have had much difficulty in ascertaining just what its points are which are relied upon for a reversal. Taking up what is called its "argument," we extract the following as being the claims relied upon: First, the defendant bonding company is not liable on its bond for the amount of the tax in any event; second, it is only liable for such taxes as accrued while Mahon was operating under the mulct law, and as soon as he failed to pay the tax he was not operating thereunder, and defendant is not liable for anything accruing after Mahon's failure to pay; third, it is not liable because the plaintiff county failed and neglected to collect the tax from Mahon, who was responsible when the tax accrued, but who thereafter frittered away his property; fourth, the county cannot recover the full tax, because one-half of it is due the town of Sanborn; fifth, the bond does not cover the tax for the quarter ending June 30th, for the reason that it was not given until April 15th; sixth, the bond does not describe the property and is therefore void; seventh, the bond does not cover interest; eighth, the bond is without consideration; ninth, the county, by inaction, lost its lien against the property whereon the business was conducted, and the surety is therefore released; tenth, the county should have resorted to its lien upon Mahon's property, and cannot hold the defendant bonding company without first exhausting that property,

or showing that the tax cannot be collected therefrom. If there be any other points concealed in this so-called argument of 31 pages, we have been unable, after careful scrutiny, to discover or discern them, although in the statement of the case it appears that the bonding company is also relying upon the fact that the law under which the bond is said to have been given has been repealed, and was not in force when the bond was executed, and it is therefore void. We shall take up these points as nearly in order as possible, although the last suggestion should perhaps be first disposed of.

It is true that when the bond was given the act of the General Assembly referred to in the conditions thereof had been repealed, or, more properly speaking, superseded by the Code of 1897; but, as practically all the provisions thereof were re-enacted in that Code, there was no hiatus, and such parts of the Acts of the Twenty-Fifth General Assembly as were carried into the Code of 1897 are and have been in full force and effect ever since their original enactment. *State v. Prouty*, 115 Iowa, 657. But conceding *arguendo* that they were all repealed, the bond is so conditioned as that the bonding company expressly agreed that "Mahon should faithfully observe and comply with all the provisions of the laws of the State of Iowa relating to keeping and selling intoxicating liquors." It was for the sum of \$3,000, and fully complied with subdivision 3 of section 2448 of the Code. The other provisions of the bond may therefore be regarded as surplusage. They do not contemplate doing an illegal act; nor was the bond given to enable Mahon to violate the law. The provision we have quoted was to secure his observance of the law, and was therefore valid. Even if the bond did not strictly conform to the statute, it is good as a common-law obligation, and may be enforced as such.

But it is said that the surety company is in no event liable for the tax imposed by sections 2432 to 2445, inclusive, of the Code. That question has been decided adversely to

1. BONDS: sufficiency.

appellant. See *Breeding v. Jordan*, 115 Iowa, 567; *Guedert v. Emmet County*, 116 Iowa, 44; *Knoll v. Marshall Co.*, 114 Iowa, 647; *Knoll v. Marshall Co.*, 102 Iowa, 573. An attempt is made to distinguish these cases on the theory that they were each decided under the acts of the Twenty-Fifth General Assembly, and not under the present Code. But this is not true. See the *Guedert Case*, *supra*.

2. **MULCT TAX:**
liability of
sureties.

The bonding company insists that, as Mahon failed to pay the taxes which are here sought to be recovered, he was no longer operating under the mulct law, and that it never became liable for these taxes. Reliance is placed upon
3. **SAME.** *Gorman v. Williams*, 117 Iowa, 560, and *Breeding v. Jordan*, *supra*. These cases are not in point, and really have no bearing upon the proposition here involved. The county may elect to collect the mulct tax by action on the bond, or to prosecute the principal for illegal sales made by him after failure to pay the tax. In any event, the tax is due and payable no matter whether the principal complies with the law or not. Appellant's argument, if accepted, would defeat any recovery from a surety on a liquor dealer's bond, and is manifestly unsound. *Breeding v. Jordan*, *supra*, decides this question adversely to appellant. See, also, *In re Smith*, 104 Iowa, 199.

Plaintiff did not collect the tax from Mahon when it became due, and it is said that because of its failure to do so the surety on his bond was and is released and discharged.

Inaction on plaintiff's part is all that can be
4. **SAME.** charged. It has done nothing to release its lien; and in no event could there be anything more than a *pro tanto* discharge. But the county had a double remedy, and it could resort to either. By resorting to one it did not necessarily waive the other. See cases heretofore cited. Mere inaction on the part of the county did not release the surety. *Read v. Am. Surety Co.*, 117 Iowa, 10; *Whitehouse v. Am. Surety Co.*, 117 Iowa, 328.

The bond was given April 15th, and the action is for quarterly installments, one of which was due June 30th or July 1st. It is said that the bond cannot be made retroactive so as to cover the entire first quarter.

5. SAME.

There are two all-sufficient answers to this contention. The first is that the tax is payable in advance, and the second is that whoever is assessed shall be liable for at least one quarterly installment, and is in no event entitled to any rebate, unless he discontinues the business before the expiration of the second period or quarter. Code, section 2436. In any event, the principal is liable for the full tax for the quarter in which he commenced business; and his surety was also liable for the same amount. Code, sections 2436, 2448. To that extent the bond may be said to be in a sense retroactive.

Next it is said that the bond does not describe the property. There is no requirement that it should, although it is perhaps better that it do so. See Code, section 2448. The provision in the bond, is, in effect, that where-

6. SAME.

ever Mahon was engaged in the business of selling or keeping for sale intoxicating liquors within the county of O'Brien he should comply with all the provisions of the law. This is sufficiently broad to cover the case, and, even if the property ought to have been described, we do not see how the surety may avail himself of the omission. *Starr v. Blatner*, 76 Iowa, 356. There was nothing illegal or contrary to public policy in this broad condition. The bond was given to enable Mahon to meet the requirements of the mulct law, and to permit him to escape the penalties of the prohibitory liquor law. It was not made primarily to enable him to violate the law, but to secure immunity under its express provisions.

II. Plaintiff dismissed its action as to penalties, but did seek to recover interest. The latter was allowed it. No

citation of authorities is needed to show that
7. INTEREST.
interest may be recovered on such a bond as was here given.

III. The claim that the bond was without consideration is bottomed on the thought that, as it was given under a law which had been repealed, there was no authority therefor, and consequently it was and is void. We

8. BOND: consideration.

have already seen that the law was not repealed by the Code. But, if it were technically repealed, it does not follow that the bond is void. It was given to secure the immunities provided by the mulct law as found in the Code, and under the conceded facts it operated to secure them. It was accepted by the authorities as being sufficient under the law, and Mahon had the advantage thereof. This was a sufficient consideration. *Potter v. State*, 23 Ind. 550.

IV. It is said that the county cannot recover the full tax for the reason that one-half of it goes to the town of Sanborn. The entire tax is payable to the county treasurer, and the law in its entirety authorizes and directs

9. RECOVERY OF MULCT TAX.

the county and its officials to collect it. When collected, one-half the \$600 is to be paid to the municipality in which the business is conducted. Clearly, the county is authorized to sue for the entire tax or for any quarterly installment.

V. The remaining objections may be considered under one head. They relate to the inaction of the county, and to its failure to collect the tax from the property used by Mahon in the conduct of his business. We

10. SAME.

have already observed that mere inaction of the county is no defense for the surety. But it is argued that, as the surety cannot be subrogated to the rights of the county, the county should first exhaust its remedies against the principal before resorting to the surety. As already stated, the county has a double remedy where the mulct law is in force. The payment of the tax operates as a quasi license or permission to do business. The license fee or tax charged is secured by a lien upon the property, and may be enforced in the manner pointed out by statute. It is

also a personal charge against the party who conducts the business, and, as noted, this charge is secured by the bond given under the provisions of the law. The county has the right to pursue either remedy. *Guedert v. Emmet Co., Knoll v. Marshall Co., supra.* The surety company knew, or should have known, of its liability on this bond to pay the tax, and that it could not have subrogation to the rights of the county. With this knowledge it undoubtedly charged a fee commensurate to the risk assumed, and, while it may not be entitled to subrogation, it may undoubtedly recover the amount it is compelled to pay from the principal, Mahon. We have assumed, without deciding, that no subrogation may be had to the rights of the county, because all parties assume this to be the law.

No complaint is made of the rulings on the pleadings attacking the surety company's cross-petition; nor is any complaint made of the final decree in so far as any issue was tendered thereby.

We have now considered every proposition which we are able to discover in the prolix brief filed by counsel for appellant. If any point has escaped us, it has been due to their failure to follow our rules, and they, of course, have no cause for complaint. We might well have refused to consider the case because not presented according to rule, but have preferred to take up such points as seem to be presented, and to decide them on their merits.

Finding no error, the judgment is *affirmed*.

W. S. SWANK V. FARMERS' INSURANCE COMPANY OF CEDAR
RAPIDS, IOWA, Appellant.

Insurance: SALE OF PROPERTY: FORFEITURE OF POLICY. The conditions of an insurance policy which if violated render the same void, will be strictly construed and in cases of doubt will be resolved against the company, so that a contract of sale of the

property which will work a forfeiture under the provisions thereof must be one which is enforceable and not a mere option or dependent upon some contingency to give it vitality. In the instant case the contract is held unenforceable.

Appeal from Appanoose District Court.—HON. ROBERT SLOAN, Judge.

FRIDAY, FEBRUARY 10, 1905.

SUIT on a policy of fire insurance. There was a trial to the court, and a judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

Deacon & Good, for appellant.

Baker & Baker, for appellee.

SHERWIN, C. J.—The policy in suit was issued to the plaintiff on the 15th day of April, 1901, and the loss occurred on the 15th day of November of the same year. On the 3d day of October preceding the fire, the plaintiff, who was the owner of the insured property, and Elijah Hiatt, who was a prospective purchaser thereof, signed a written instrument, which, so far as it is material here, was as follows: "This agreement made and entered into this 3rd day of October, 1901, by and between W. S. Swank, party of the first part, and Elijah Hiatt, party of the second part, witnesseth: The party of the first part has this day sold to the party of the second part, the following described real estate, to-wit: * * * Possession to be given March 1st, 1902. For the consideration of nine thousand dollars (\$9,000) to be paid as follows: \$7,000 in cash, to be paid on or before March 1st, 1902, and the party of the first part agrees to take a second mortgage of two thousand (\$2,000) dollars on the above described land, at six per cent. interest, due January 1st, 1905. Party of the second part agrees to make payments mentioned." The policy was conditioned that it

should be void if there was a contract "of sale or to sell" the insured property, "or if any change or diminution other than by death take place in the interest, title or possession" thereof.

The appellant contends that the written instrument executed by the parties was a valid contract "of sale or to sell" the insured property; that it changed or diminished the plaintiff's interest therein, and rendered the policy void. On the other hand, the appellee says that the writing in question was only a part of the negotiations for a sale of the property; that it was not delivered, acted upon, or effective until long after the fire; and that at the time of the loss the plaintiff retained and held the sole legal title to, and equitable interest in, the property.

If there was a valid and enforceable contract "of sale or to sell" the property, the policy became void by its express terms. It is therefore necessary to determine the exact agreement the parties entered into with reference to the land and the insured buildings situated thereon. Hiatt wanted to buy the plaintiff's farm, and they agreed on the price, \$9,000, and on the times and terms of payment and possession. But Hiatt only had \$1,500 in money, and could not buy unless he could procure a loan of \$5,500 on the farm. The plaintiff was advised of this, and it was agreed that Hiatt could have the farm if he could procure the loan, and that if he could not do so the deal would be at an end. Neither of the parties knew whether a loan of that amount could be procured, and they went to loan agents, who were also uncertain about the matter, but agreed to procure it if possible, and suggested that a written memorandum of the agreement between Swank and Hiatt be executed and left with them, and that a deed for the property be also made and left with them, for the purpose of showing title in the abstract that was to be used in procuring the loan. The writing was then executed, and a deed prepared, which was executed by the plaintiff and his wife soon thereafter and

left with the loan brokers. The execution of the deed was undoubtedly a part of the same transaction, and the deed and the contract must be construed together. They were both left with the brokers under a distinct parol agreement that no change in the possession thereof was to be made without the consent of the plaintiff, and that unless the loan could be procured the transaction was of no validity. An abstract of the title was made and submitted to the parties from whom the loan was sought. Defects were found in the title, which could only be cured by an action to quiet title, and on the 11th day of November, 1901, such an action was brought, and in January thereafter a decree was entered quieting the title in Hiatt; the suit having been brought in his name, whether with the knowledge of the plaintiff does not appear. The fire occurred on the 15th day of November, 1901, and the loan was not obtained or the deed delivered to Hiatt until some time in February, 1902.

The foregoing facts were found by the trial court, and its finding has the force and effect of a verdict. With these facts established, we think there can be no doubt as to the validity of the policy at the time of the plaintiff's loss, and of the defendant's liability in this case. Conditions which may render a policy void if violated are to be construed strictly, and, if there be doubt as to their meaning, the insured is to have the benefit of such doubt. The condition rendering the policy void in case of a contract "of sale or to sell" must be construed to mean that a valid and enforceable contract shall have the effect stipulated, and, unless there was such a contract, there was no breach of the condition. Hiatt agreed to take the farm on the terms named, provided he could procure the necessary money by mortgaging it; and, if he could not so raise the money, he was under no obligation to the plaintiff which could be enforced either in law or in equity. The plaintiff, in effect, did no more than to give Hiatt an option to buy, which he might or might not exercise, and it could not become an enforceable

contract unless Hiatt secured the money by the proposed loan; and the loan was finally dependent on an action to quiet title, which was not determined until long after the fire. At the time of the plaintiff's loss, then, he had entered into no contract that could then be enforced, nor had there been any change or diminution in his interest in the property. He was in possession thereof, and entitled thereto, until the 1st day of March following, in any event. What equitable interest did Hiatt have in the property at the time of the fire? Manifestly none, for it was not then known whether he could raise the money to make the purchase; and, until he was able to say to the plaintiff that he could raise it, there was no acceptance of the contract on his part, nor any obligation on the part of the plaintiff. In other words, there was no binding contract before that time. If in the meantime a judgment had been rendered against the plaintiff, there can be no doubt that it would have been a lien on the land itself. The fact that the sale was completed long after the fire can make no difference with the legal principle involved. We are dealing with the legal and equitable rights of the parties at that particular time, and by these rights must the appellant's liability be determined. The conclusion here reached is supported by *Kempton v. Ins. Co.*, 62 Iowa, 83, and by *Pringle v. Ins. Co.*, 107 Iowa, 742; and see, also, *Erb v. Ins. Co.*, 98 Iowa, 607. And it is not, in our judgment, inconsistent with the holding in *Davidson v. Ins. Co.*, 71 Iowa, 532, when the facts of that case are clearly in mind. It was there held that there was a completed contract of sale, and the decree was based thereon. The reasoning of the case supports our conclusion here. Such was also the case of *Skinner & Sons v. Houghton*, 92 Md. 68 (48 Atl. Rep. 85; 84 Am. St. Rep. 485), and *Gibb v. Insurance Co.*, 59 Minn. 267 (61 N. W. Rep. 137; 50 Am. St. Rep. 405). As further sustaining the opinion generally, see *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 552 (55 S. W. Rep. 933; 48 L. R. A. 510; 77 Am. St. Rep. 129); *Smith v. Ins. Co.*, 91

Cal. 323 (27 Pac. Rep. 738; 13 L. R. A. 475; 25 Am. St. Rep. 191).

The trial court's finding of facts is fully sustained by the record, and the judgment is *affirmed*.

ALFRED Q. WOOSTER, Appellant, v. J. W. BATEMAN, ET AL.

Judgments: LIMITATION OF ACTION. By Code, sections 3439 and

- 1 3447, the time during which an action may be maintained on a judgment rendered in a court of record, is limited to the five years intervening between the expiration of fifteen years from its rendition and the twenty years therefrom when the same is barred.

Statute of limitations: AMENDMENT. The legislature may amend

- 2 an existing statute so as to lengthen or shorten the time within which a cause of action on a judgment will be barred, without violating the constitutional prohibition against the impairment of contracts, if a reasonable time is given for the commencement of action before the bar becomes effectual.

Limitations: COMMENCEMENT OF ACTIONS: REASONABLE TIME. In

- 3 determining whether the time allowed by a statute shortening the period of limitation for the commencement of action to enforce a right is reasonable, the time intervening between the passage of an amendment and the date it takes effect should be considered. In the instant case fifteen months so allowed in which actions might be brought on judgments otherwise barred by the amendment, is held reasonable.

Constitutional law: CLASSIFICATION: UNIFORMITY: DUE PROCESS OF

- 4 LAW. The act of the legislature limiting the time within which actions should be commenced to enforce all judgments rendered between the taking effect of the Code of 1873 and the Code of 1897, is not unconstitutional for nonuniformity, as it applies to all such judgments as a class, and the act simply recognizes a classification made by prior legislation; nor is it void as depriving the judgment holder of rights without due process of law.

Appeal from Mahaska District Court.—HON. JOHN T. SCOTT, Judge.

126 552
129 158

126 552
130 164

126 552
138 741

126 552
139 632

SATURDAY, FEBRUARY 11, 1905.

A. W. NAYLOR obtained judgment in the circuit court for \$57.56 and costs against J. W. Bateman January 7, 1878, and on the 22d day of September, 1903, assigned the same to the plaintiff, who seeks in this action to have certain land in the name of Francis A. Bateman subjected to its payment. The defendant's demurrer on the ground that the suit was barred by the statute of limitations was sustained, and as plaintiff elected to stand on the ruling his petition was dismissed, and he appeals.—*Affirmed.*

Carver & Wooster and D. C. Waggoner, for appellant.

W. R. Nelson and John O. Malcolm, for appellee.

LADD, J.—This action was begun November 20, 1903, to enforce a judgment entered in 1878. Under the Code of 1873 it might have been maintained at any time within the twenty years after the lapse of fifteen years from its rendition. *Weiser v. McDowell*, 93 Iowa, 772. But the statutes as they formerly stood have been so changed that the fifteen years from the rendition of a judgment within which suit against the defendant therein is prohibited is not to "be excluded in computing the statutory period of limitation for an action thereon." Sections 3447, 3439, Code. The result is that the period within which an action on a judgment may be maintained is but five years, or the time between the end of fifteen years and of twenty years after its rendition. In effecting this change no saving clause was included preserving the right to enforce judgments entered twenty years or more before the adoption of the Code, and for this reason it has been held inapplicable to them. *Cassady v. Grimmelman*, 108 Iowa, 695; *Norris v. Tripp*, 111 Iowa, 115; *Parks v. Norton*, 114 Iowa, 732.

1. JUDGMENTS:
limitation of
actions.

By chapter 137, page 103, of the Acts of the Twenty-Ninth General Assembly, however, the above sections were declared applicable "to all judgments rendered after the taking effect of the Code of 1873 and prior to the taking effect of the Code of 1897, but the time within which an action may be brought on any judgment rendered during said period, which would otherwise be barred by this amendment, is hereby extended one year after the taking effect thereof." That the Legislature may amend a statute of limitations, either shortening or extending the time within which an existing cause of action may be barred, without violating the constitutional prohibition against the passage of any law impairing the obligation of contracts, if a reasonable time is given for the commencement of an action before the bar takes effect, is settled by the united voice of authority. *Terry v. Anderson*, 95 U. S. 628 (24 L. Ed. 365); *Culbreth v. Downing*, 121 N. C. 205 (28 S. E. Rep. 294; 61 Am. St. Rep. 661); *Griffin v. McKenzie*, 50 Am. Dec. 389, and note, in which the decisions are collected; *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358 (75 N. W. Rep. 244; 66 Am. St. Rep. 653); *Watts v. Everett*, 47 Iowa, 269; *Cassady v. Grimmelman*, *supra*; 19 Am. & Eng. Enc. Law, 169.

The obligation of a contract is one thing; the remedy by which it is to be enforced quite another. Statutes of limitation pertain to the remedy, not to the essence, of the contract, and no one has the right to any particular remedy. *Tilton v. Swift*, 40 Iowa, 78. "Statutes may constitutionally be enacted changing the remedy existing when the contract was made, if they preserve the existing remedies in substance and with integrity, and do not destroy or embarrass the remedies existing when the contract was made so as substantially to defeat the rights of the creditor." *County of Kossuth v. Wallace*, 60 Iowa, 508. A statute requiring the prompt enforcement of a right does not deprive the litigant of that right, nor lessen or change the remedy. It is a mere

change of time within which the remedy may be applied, and can amount to no more than a mere inconvenience. The creditor's right remains unimpaired. True, he must reduce his claim to judgment sooner than was formerly required, but when so reduced he can perpetuate it, and the time for collecting the fruits of the judgment is not shortened. The shortening of the time in which action could be brought in no wise rendered the judgment less valuable, for, notwithstanding the shortening of the statute of limitation, there is no shortening of the life of the liability. If the creditor does not begin his action within the reasonable time allowed, the loss sustained is attributable to his own laches, and not to the change in law. The remedy is in no sense impaired. Its application merely is limited to a specified time within which it is available to all.

As to what is a reasonable time, the books are not in entire harmony. The amendment was approved March 27, 1902, and went into effect July 4th following. If the time

8. LIMITATIONS: commencement of actions; reasonable time. between its enactment and when it took effect is to be included, the period allowed for the commencement of such actions was more than a year and three months. While there is some conflict in the decisions, the great weight of authority is to the effect that such time should be considered. *Osborne v. Lindstrom*, 9 N. D. 1 (81 N. W. Rep. 72; 46 L. R. A. 715; 81 Am. St. Rep. 516); *Smith v. Morrison*, 22 Pick. 430; *Duncan v. Cobb*, 32 Minn. 460 (21 N. W. Rep. 714); *Eaton v. Supervisors*, 40 Wis. 668; *Hedger v. Rennaker*, 3 Metc. (Ky.) 255; *Hart v. Bostwick*, 14 Fla. 180; *State v. Jones*, 21 Md. 432; *Korn v. Browne*, 64 Pa. 55; *Clay v. Iseminger*, 187 Pa. 108 (41 Atl. Rep. 38); *O'Brien v. Gaslin*, 30 Neb. 347 (30 N. W. Rep. 274). See contra *Gilbert v. Ackerman*, 159 N. Y. 118 (53 N. E. Rep. 753; 45 L. R. A. 118). This period cannot be regarded as unreasonable, and we do not understand appellant to so contend, save as to parties residing out of the State. But there is no ground for dis-

crimination in their favor as against residents. The mere matter of distance in this day of telegraphy and fast mails can make no appreciable difference in the prompt enforcement of claims when so required by law.

It is next urged that, as judgments were doubtless rendered at different intervals between 1873 and 1897, the effect of this amendment was to cut off different periods

4. CONSTITUTIONAL LAW: from the time within which actions might have
uniformity; been maintained under the rule announced in
classification; *Weiser v. McDowell*, and for this reason the
due process of law. amendment enacted by the Twenty-Ninth General Assembly is in violation of the provisions of the Constitution requiring that all laws of a general nature shall be uniform, and prohibiting the General Assembly from granting to any citizen or class of citizens privileges or immunities which upon the same terms, shall not equally belong to all citizens. As already pointed out, no change of remedy was effected. All judgment holders of a specified class are required to commence actions, if at all, within a specified time. The law is uniform in that it applies to every one of the defined class, and the only question which can be involved in the contention is whether the classification was reasonable. What is essential to constitute reasonable classification for legislative purposes was considered somewhat at length in *State v. Garbroski*, 111 Iowa, 496. Without reviewing the authorities, we are content to state the conclusion reached in that and several earlier cases that the classification must be based upon apparent natural reason; some reason suggested by necessity, by such difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or the propriety of different legislation with respect to them. That the judgments to which this amendment applied were segregated from all others appears from the decisions first cited. They were of necessity and by force of previous legislation a separate and distinct class of judgments, rendered between the taking effect of the Codes

of 1873 and of 1897, to which section 3449 had been held inapplicable. The classification had already been made, and the legislation merely recognized its existence in enacting the amendment. It may be that its effect was to cut off different lengths of time within which actions might be brought on the several judgments, but as a reasonable time was provided within which suits might be commenced on all, no right or remedy was impaired, and for this reason no one is in a situation to complain. What has been said disposes of the suggestion that the amendment operated to deprive a judgment holder of the benefits of due process of law. There is nothing in the point that the Legislature might not make the section 3439 of the Code as amended applicable to the judgments contemplated. See *Ferry v. Campbell*, 110 Iowa, 290; *Blair v. Ostrander*, 109 Iowa, 204.

As we find the act in harmony with the Constitution in any event, it is unnecessary to take up the question whether the judgment sued on was a contract in the sense contemplated by the Constitution. But see *Ferry v. Campbell*, *supra*; *Butler v. Rockwell*, 17 L. R. A. 611, and note; *Bettman v. Cowley*, 19 Wash. 207 (53 Pac. Rep. 53; 40 L. R. A. 815); *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 162 (13 Sup. Ct. 54, 36 L. Ed. 925).—*Affirmed*.

TOWN OF LOVILIA, Appellee, v. MAJOR COBB, Appellant.

Cities: POLICE POWER: ORDINANCES. A city has power under Code, 1 section 680, to enact an ordinance prohibiting the keeping of a place of business, resorted to for the purpose of drinking intoxicating liquor, open on Sunday.

Ordinances: TITLE. An ordinance prohibiting the keeping of a 2 place, resorted to for the purpose of drinking liquors, open on Sunday, is comprehended in a title "an ordinance concerning misdemeanors."

Information: FILING. It is not necessary that an information be 3 marked "filed" by a magistrate, where it was sworn to before

him. and left with him and treated as an information in the trial of a case.

Information: AMENDMENT. An information before a mayor charging the violation of an ordinance prohibiting an open drinking resort on Sunday, may be amended so as to describe the place, even after an appeal to the district court.

Verification of information. It is presumed that a mayor before whom an information was verified, was within his jurisdiction when the oath was administered.

Jury trial: WAIVER. A defendant may waive a jury on the trial of an appeal from a conviction before a mayor for the violation of an ordinance.

Appeal from Monroe District Court.—HON. C. W. VERMILLION, Judge.

SATURDAY, FEBRUARY 11, 1905.

DEFENDANT was accused by information before a magistrate of keeping open his place of business, to which persons resorted for the purpose of drinking intoxicating liquors, on Sunday, contrary to the ordinances of the plaintiff town. He was convicted before the magistrate, and appealed to the district court. In that court defendant demurred to the information, but before the demurrer was ruled upon plaintiff filed an amendment to the information, pleading the location of the place which defendant was alleged to have kept open as being in the town of Lovilia. Thereupon the demurrer was overruled. The case then went to trial before the court, a jury having been waived, resulting in a judgment of guilty. Defendant appeals.—*Affirmed.*

Mitchell, Tomlinson & Price, for appellant.

J. F. Abegglen, for appellee.

DEEMER, J.—An ordinance of the plaintiff town prohibited any one from engaging in any calling, avocation,

or business on Sunday, or from keeping open any place of business of any kind, or from permitting persons to resort thereto for the purpose of drinking intoxicating liquors on the Sabbath day, except that the work be of necessity or charity. The information charged the defendant with keeping open his place of business on Sunday, which place was resorted to for the purpose of drinking intoxicating liquors. The charge is clearly within the ordinance, and unless there be some invalidity in the act, or some error in the proceedings under which defendant was convicted, the judgment must stand. Defendant contends, however, that the ordinance for several reasons is invalid. Among others, it is said that the town had no authority to enact the same because the acts charged are an offense under the laws of the State, and therefore the ordinance is inconsistent therewith. Without setting forth the statutes which it is claimed cover the same matter, it is sufficient to say that none of them cover the acts charged. Even if they did, we are not prepared to hold the ordinance invalid. No such facts are charged as would show a violation of the "mulet law," and there is nothing to show that defendant was acting under this law; hence *Iowa City v. McInnery*, 114 Iowa, 587, is in point. *Bloomfield v. Trimble*, 54 Iowa, 399, is controlling on this proposition. The general welfare clause of section 680 of the Code authorized the town to adopt the ordinance in question. *Bloomfield v. Trimble, supra*.

II. Further, it is argued that the ordinance is invalid because it embraces more than one subject, and the object thereof is not clearly expressed in the title. There is nothing in this contention. *State v. Wells*, 46 Iowa, 663. The title of the ordinance was "An Ordinance Concerning Misdemeanors."

III. Next it is argued that the mayor who originally tried the case had no jurisdiction — First, because the information was not marked filed by him; and, second, because it did not locate the place where the offense is said to

have been committed. The first point is without merit.

True, the original information was not marked
 8. INFORMATION: filed; but this was not essential to give the
 filing. magistrate jurisdiction. It was in fact sworn
 to before the mayor, and left with him as an information.
 He treated it as such, and acted thereon. On that defendant
 was convicted, and from the judgment thereon he appealed.
 This shows a sufficient filing. *State v. Briggs*, 68 Iowa,
 416; *State v. Guisenhause*, 20 Iowa, 227.

The sufficiency of the information in its charge as to
 the location of the place kept by the defendant was not
 challenged until the case reached the district court. Upon
 such challenge being interposed, plaintiff
 4. INFORMATION: amendment. filed an amendment to the information, making
 the charge in this respect specific. That an
 information may be amended is too well settled to require
 the citation of authorities, and the amendment may be made
 after appeal to the district court. *State v. Merchant*, 38
 Iowa, 375; *State v. Doe*, 50 Iowa, 541; *State v. Reilly*, 108
 Iowa, 736.

IV. Next it is argued that the amendment to the in-
 formation was not verified. This point does not seem to
 have been made in the district court. Moreover, the amend-
 ment appears to have been sworn to before the
 5. VERIFICATION OF INFORMATION. mayor. But it is said that the mayor was out-
 side of his jurisdiction when he administered
 the oath. The presumption is otherwise, and this presump-
 tion is not rebutted by anything in the record.

V. In a reply argument defendant contends that he was
 entitled to a jury trial in the district court, and that this
 right could not be waived. This point, even if properly
 raised, is settled adversely to defendant in
 6. JURY TRIAL: waiver. *State v. Ill.*, 74 Iowa, 441. Conceding, *argu-*
endo, that the proceedings are criminal in char-
 acter, yet as they are to be tried in the same manner, both
 originally and on appeal, as proceedings before a justice

(Code, section 692), defendant could waive a jury on his appeal.

VI. Lastly, it is argued that there is no evidence to support a conviction. In answer to this it is sufficient to say that we find ample evidence to sustain the charge.

There is no error, and the judgment is *affirmed*.

MRS. AUGUSTA KAISER V. HAHN BROTHERS, Appellants.

Sidewalks: CONTRIBUTORY NEGLIGENCE. Although a pedestrian may
1 not pass along a sidewalk utterly heedless of danger, yet failure to anticipate an unusual danger is not contributory negligence as a matter of law. Under the evidence plaintiff's negligence was properly submitted to the jury.

Defective sight: DEGREE OF CARE: INSTRUCTIONS. Where one relies
2 upon defective sight as an excuse for failing to observe an obstruction upon the sidewalk, from which an injury resulted, the defendant is entitled to an instruction that corresponding caution is exacted, although only ordinary care under all the circumstances is required.

Appeal from Wapello District Court.—HON. FRANK W. EICHELBERGER, Judge.

SATURDAY, FEBRUARY 11, 1905.

ACTION to recover damages for personal injuries caused, as alleged, by the negligence of defendants. Verdict and judgment for plaintiff. Defendants appeal.—*Reversed*.

Gilmore & Moon, for appellants.

Steck & Smith, for appellee.

McCLAIN, J.—It appears without conflict in the evidence that on November 30, 1901, at half past two o'clock in the afternoon, plaintiff, who was passing along the side-

walk in front of defendants' store in the city of Ottumwa, tripped or stumbled over two heavy planks or skids which had been used for unloading produce from a wagon into the front of the store, and, when the wagon was removed, had been shoved partway into the store, and left with their ends resting on the sidewalk. The jury specially found that the use of the planks by defendants was a temporary and reasonable use, and the negligence on which their verdict was predicated must have been that, after the necessity for the use of the planks had ceased, they had been negligently allowed to remain on the sidewalk for an unreasonable length of time. This length of time, according to the finding of the jury, was five minutes. It is urged that the evidence conclusively shows that the planks could not have been on the sidewalk for more than two minutes prior to the accident, after they were shoved back from the wagon, and that the finding of the jury that the planks had been negligently allowed to remain on the sidewalk for an unreasonable length of time was without support in the evidence, and was the result of passion and prejudice. But we would not be inclined to interfere with the conclusions of the jury on this matter.

Nor would we be inclined to hold that the evidence in the record conclusively shows contributory negligence. The testimony given by plaintiff, as a witness, that she was not looking for anything in her way, because the

1. CONTRIBUTORY NEGLIGENCE. walk had always been clear before, indicates to our minds only that she was not anticipating any obstruction. And clearly it would not be contributory negligence to fail to anticipate such an obstruction on the sidewalk. Whatever her duty may have been as to using care to avoid any obstruction which might be on the walk, it was certainly not negligence to fail to anticipate beforehand something which she had no occasion to anticipate; that is, the particular obstruction against which she in fact stumbled. But it is true, on the other hand, that plaintiff could

not go along the sidewalk utterly heedless and oblivious of any danger, even though not of a nature which she might have anticipated; and perhaps, if there were no explanation whatever of how it happened that plaintiff, in broad daylight, and when, as it appears, the sun was shining, ran against and stumbled over two planks, each twelve inches wide, three inches thick, and extending from the level of the floor of the store, eighteen inches above the sidewalk, to within four or five feet of the curbing (the walk being twelve feet wide), so that the top of the planks was five or six inches above the sidewalk where the plaintiff ran against them, about the middle of the walk, there might be ground for saying, as a matter of law, that plaintiff was guilty of contributory negligence. *Yahn v. Ottumwa*, 60 Iowa, 429; *Tuffree v. State Center*, 57 Iowa, 538; *Mathews v. Cedar Rapids*, 80 Iowa, 460; *Barnes v. Town of Marcus*, 96 Iowa, 675. But plaintiff testifies that she was dazzled by the sun shining in her eyes and on the planks, and for that reason did not see them; and we think that the question was properly left to the jury, whether, under the circumstances, plaintiff was guilty of contributory negligence.

But it was alleged in the petition and testified to by plaintiff, that her eyes were weak by reason of recent serious illness, and that she was wearing colored glasses to protect

2. DEFECTIVE, SIGHT: degree of care; instructions. them from the glare of the sun, and the fact was alleged and proved in such a way as to

indicate that plaintiff was contending that this fact would be an excuse for failure to see an obstruction on the walk which would be perfectly plain and obvious to one with ordinarily clear vision. It is well settled, however, that defective vision also imposes the duty of greater care and foresight in order to discover dangers which would be obvious to an ordinary person. It is true that the walks of a city are "for the use of the general public, without discrimination — for the weak as well as those possessing perfect health, strength, and vision." *Hill v. Glenwood*, 124

Iowa, 479. But one with defective sight should be correspondingly more careful. *Winn v. Lowell*, 1 Allen (Mass.) 177; 1 Thompson on Negligence (2d Ed.) 316.

An instruction was asked for defendants, embodying this proposition; and we think it should have been given. The instruction asked was not open to the objection that it required more than ordinary care of the plaintiff under the circumstances. It correctly stated the rule recognized in *Hill v. Glenwood*, *supra*, that, although the degree of care required of a person with defective eyesight is the same as that required of other persons — that is, ordinary care under the circumstances — yet ordinary care on the part of a person with defective eyesight involves greater prudence and caution than is required to constitute ordinary care on the part of a person having full possession of his faculties. The court, in instructing the jury, after stating the allegations of the petition with reference to the weakness of plaintiff's eyes, and the wearing of colored glasses by her at the time for their protection, proceeded to include these facts in an enumeration of circumstances to be taken into account by the jury in determining whether plaintiff was guilty of contributory negligence, directing the jury to consider "whether or not the sun was shining, and, if so, whether it made a glare on the planks or sidewalk * * * whether or not her attention was diverted at the time; whether or not she was weak from recent illness; whether or not her eyes were weak at the time; whether or not she was wearing green glasses for the protection of her eyes, and, if so, the effect of such glasses on her eyesight; and all other facts and circumstances which the evidence tends to prove." It is true that the jury were fully instructed that it was the duty of plaintiff to act as an ordinarily prudent person would act under the circumstances; but, in view of the apparent reliance placed by plaintiff on the defective condition of her eyes, and the wearing of colored glasses, as an excuse for not observing the obstruction in the walk, we think defendants

were entitled to an instruction such as that asked — to the effect that, under such circumstances, plaintiff was bound to use greater care and caution. Without such an instruction, the jury were quite likely to be misled as to the legal effect of the facts proven.

For failure to instruct as above suggested, and giving the instruction referred to, the judgment of the lower court is *reversed*.

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| 126 | 565 |
| 131 | 716 |

CHARLES H. JOHNSON, Appellant, v. THE FARMERS' INSURANCE Co., of Cedar Rapids, Iowa, Appellee, and
CHARLES H. JOHNSON, Appellant, v. THE MERCHANTS' AND BANKERS' FIRE INSURANCE Co., of Des Moines, Iowa, Appellee.

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| 126 | 565 |
| 1143 | 462 |

Pleadings: AMENDMENT. It is not an abuse of discretion to permit
1 the filing of an amendment after the evidence is in, to conform the pleadings to the proof.

Insurance: CONDITIONS: VIOLATION. Under Code, section 1743, the
2 failure of an insured to keep a set of books, or the violation of an iron safe clause, will not defeat recovery where there is neither pleading nor proof that such neglect contributed to the loss.

Title: BREACH OF WARRANTY. On an issue of fraudulent representation as to title in procuring insurance, proof of a contract of
3 purchase of the insured property, wherein the assured agreed that the title should remain in the seller until the property was fully paid for, did not of itself negative an absolute sale or show a breach of the warranty of sole ownership.

Concurrent insurance. The procurement of concurrent or additional insurance without the knowledge or consent of the company then carrying a risk on the same property, which is in violation of the terms of its policy, will avoid its liability for
4 a loss.

Same. Knowledge of agent accepting an application that the property is covered by other insurance, is binding on the company, and precludes a defense to an action on the policy based
5 on that ground.

Reformation of instruments. To reform an instrument the proof
6 must be clear, convincing, and satisfactory.

Trial de novo. Although a case is triable *de novo* on appeal, in
7 view of the opportunity of the trial judge to observe the
demeanor of the witnesses, his findings will be disturbed with
reluctance.

Appeal from Davis District Court.—HON. M. A. ROBERTS,
Judge.

SATURDAY, FEBRUARY 11, 1905.

ACTIONS in equity to reform certain policies of fire insurance, and for judgments for the amount of said policies. Decrees for the defendants, and plaintiff appeals.—*Affirmed.*

Taylor & Scarborough, for appellant.

Payne & Sowers, and *Deacon & Good*, for appellee Farmers' Ins. Co.

Payne & Sowers and *C. E. Campbell*, for appellee Merchants' & Bankers' Ins. Co.

DEEMER, J.—Originally these were independent law actions brought upon separate policies of fire insurance to recover the amount of plaintiff's loss by fire on a blacksmith shop and its contents located in the town of Floris, Davis county, Iowa. The Farmers' Company denied that plaintiff was the owner of the personal property in the building, and pleaded false swearing on the part of the insured in his proofs of loss regarding his ownership of the property. The policy in the Farmers' Company was on plaintiff's blacksmith shop, tools, wood and iron material, farm implements, and buggies. After that company had answered, plaintiff filed an amendment to his petition, asking reformation of the policy by striking out therefrom the word "buggies"; claiming that this was inserted both in the application

for insurance and in the policy by mutual mistake and oversight. The Farmers' Company answered this by a general denial, and also pleaded breach of a condition in the policy against concurrent insurance upon the whole or any part of the property insured. It also pleaded fraud and false swearing on the part of plaintiff in his proofs of loss as to the ownership and condition of the title to the property insured, and misstatements in the application as to the condition of the title.

To the original petition filed in the action brought against the Merchants' & Bankers' Company, that company filed a demurrer, which does not seem to have been ruled upon. The policy in that case was for \$200 upon buggies, mowing machines, binders, and farm implements, and such other goods, not more hazardous, usually kept for sale in an implement stock. While the demurrer in that case was pending, plaintiff filed an amendment to his petition, asking for a reformation of that policy by striking out the words "farm implements" and "such other goods not more hazardous usually kept in an implement stock"; claiming that these were inserted by mutual mistake both in the application for insurance and in the policy issued thereon. A demurrer to this amendment was overruled, and thereupon the Merchants' & Bankers' Company answered, pleading breach of a condition of the policy as to concurrent insurance, misstatements in the application regarding the title and incumbrances upon the property insured, and false swearing and fraud on the part of plaintiff in his proofs of loss. It also pleaded breach of conditions requiring plaintiff to keep a set of books, and of an iron-safe clause. It also denied any mistake in either the application or the policy. A reply was filed by plaintiff in each case, in which he alleged that none of the matters pleaded by the defendants in any manner contributed to the loss. The cases were by agreement tried together, and upon the same testimony, so far as applicable.

After the taking of the testimony, and while the case was under consideration by the trial judge, plaintiff filed an amendment to his petition, in each case pleading an estoppel on each company from relying upon their defenses of breach of condition and covenants of the policies, due to the knowledge of the agents of each company who solicited the insurance of the exact condition of affairs. Motions to strike these amendments were interposed by both companies, but the trial court in its final decree overruled the same. As they were evidently made to conform to the proofs in the case, there was no abuse of discretion in these rulings.

II. As to the breach of the agreement to keep a set of books, and of the iron-safe clause, section 1743 of the Code eliminated these matters, for there is neither pleading nor proof that they in any manner contributed to the loss.

III. The issue of false swearing in the proofs of loss we may also pass, for the reason that the testimony is not such as would defeat plaintiff's recovery if this were the only matter relied upon as a defense.

IV. Recognizing the force of the conditions in the policies as to concurrent or additional insurance, plaintiff seeks to strike out certain words from each policy, so as to

make it appear that they did not cover the same property, either in whole or in part. The case

turns, therefore, largely upon the equitable issues of reformation. Defendants also claim that, even if reformed as prayed, they both cover some of the same property lost in the destruction of the blacksmith shop and its contents by fire. Conceding *arguendo* that this is so, plaintiff responds by saying that the agent of the Merchants' & Bankers' Company, which company issued the second policy in point of time, had knowledge of the insurance policy issued by the Farmers' Company, and that the Merchants' & Bankers' Company is estopped from relying upon the con-

dition as to additional insurance. Both companies claim that plaintiff was not the sole owner of the property insured; that title to part of it was in another, and that, in any event, another held a lien or incumbrance upon the property insured, or a part of it; and that plaintiff represented, stated, and warranted in his applications that he was the sole owner of the property, and that there were no liens or incumbrances thereon. Bearing upon this issue, defendants introduced in evidence a contract under which plaintiff purchased a part of the goods destroyed by fire, wherein he agreed that the title to the property purchased, and the ownership thereof, as well as the proceeds thereof, should remain in the vendor until the goods were fully paid for. This, of course, does not of itself negative an absolute sale to the plaintiff of the goods purchased by him under the agreement. None of the contracts are set out in full in the abstract; hence we cannot say that plaintiff did not, for the purposes of the case, become the absolute owner of the goods. Indeed, this point is not relied upon by the defendants with any great confidence. But it is claimed that the vendor of a part of the goods had a lien or incumbrance thereon in virtue of this contract, and that this avoided the policies, which each, in effect, provide that they shall be void if the property be incumbered by lien, or liable to any lienholder. In view of our conclusions on other branches of the case, this point need not be decided at this time.

Going now to the equitable issues of reformation of the applications and the policies, we think that, as to the Farmers' Company, its defense is good, even if the policies were reformed as prayed. Plaintiff admits that this policy covered farm implements, and that in this respect no mistake was made. But he says that he did not then have any buggies, and that there was no intention to insure them. Let this be conceded: it still appears that the second policy covered mowing machines and binders, which are undoubtedly farm implements.

4. CONCURRENT
INSURANCE.

So that as to this company there was concurrent or additional insurance without its knowledge or consent. This of itself disposes of the claim against the Farmers' Company, even if there were nothing more in the case. The mere fact that plaintiff did not have mowing machines and binders in stock when he took out his policy in that company is wholly immaterial. He could have recovered for their loss on the Farmers' Company policy, had the issue been as to that company alone. They were added to the stock after the policy was issued, it is true, but they came within the designation of the property insured, and were immediately protected by that policy. There are no facts justifying a finding of an estoppel as to this company. So that it has at least a double defense.

As to the Merchants' & Bankers' Company, we are constrained to hold that, while this double insurance would ordinarily be a defense as to it, it cannot be availed of here,

for the reason that one of its agents knew before
5. SAME. the application for the insurance was written that there was other insurance upon farm implements. This was binding on this company, for it related to a present condition, and not to a prospective one.

On the main issue of reformation we are satisfied with the conclusions of the district court. The quantum of proof required in such cases is well understood. It must be clear,

convincing and satisfactory. If there be a substantial doubt as to the agreement, plaintiff
6. REFORMATION OF INSTRUMENTS. must fail. *Marshall v. Westrope*, 98 Iowa,

324; *Hunt v. Gray*, 76 Iowa, 268. We have gone to the transcript, and carefully read the testimony of each and all of the witnesses, and do not find that clear and satisfactory showing required. Every writing in the case — and there are many of them — negatives plaintiff's claim. His sworn proofs of loss belie his present contention. His original petitions filed in this action are against him. He is contra-

dicted by several apparently credible witnesses on many important matters.

Moreover, most of the testimony was from witnesses who appeared before the trial judge in person, and were examined orally by counsel for the respective parties. The

trial judge, who was, so far as shown, in no manner prejudiced against the plaintiff or his claim, after seeing and hearing these witnesses, found against the plaintiff; and, while the case is *triable de novo* in this court, we cannot and should not overlook the fact that much is to be gained from hearing and seeing the witnesses introduced by the respective parties. In such cases it is with reluctance that we disturb the findings of a trial judge. *Wilkie v. Sassen*, 123 Iowa, 421. There is no such showing here as would justify us in reversing the trial judge in his finding of facts. He held there was no mistake in either policy, and with that we are content.

The decrees are therefore *affirmed*.

C. M. FORREST and ISAAC COBBS, Appellants, v. THOMAS B. O'BRYAN, EDWARD S. O'BRYAN, AND OTHERS, Appellees.

Partnership contract: CONSIDERATION. An oral agreement by which

- 1 defendant was to purchase in his own name a single tract of land, paying therefor with his own funds, to be repaid by a sale of mining rights, and to which plaintiffs neither contributed nor engaged to contribute anything, if sufficient to establish a partnership in the profits, still the agreement could not be enforced for want of consideration.

Partnership contract: RESULTING TRUST. A mere verbal agreement

- 2 whereby defendant was to purchase a tract of land in his own name and with his own funds to be resold and the profits above cost to be the joint property of plaintiffs and defendant, and to the purchase of which plaintiffs contributed nothing, gave them no right or interest in the land; nor was defendant's relation to the claimed partnership shown to have been such as to raise a trust in favor of plaintiffs.

Appeal from Monroe District Court.—HON. ROBERT SLOANE, Judge.

SATURDAY, FEBRUARY 11, 1905.

THE opinion states the case.

J. C. Mabry and N. E. Kendall, for appellants.

T. B. Perry and W. W. O'Bryan, for appellees.

WEAVER, J.—The plaintiffs claim that in October, 1900, they entered into an oral agreement of partnership with the defendant Thomas B. O'Bryan for the purpose of purchasing certain land to be sold again for the benefit of the firm; that in pursuance of said agreement said defendant did purchase the land, but caused the same to be conveyed to his son, the defendant Edward S. O'Bryan.. It is alleged, however, that Edward S. O'Bryan was not in fact a bona fide purchaser of the land; that he paid no part of the consideration therefor, but took the naked legal title at the request of his father as a method of carrying out the purposes of the alleged partnership, and held said title in trust for said partners, and afterwards did in fact convey the land to Thomas B. O'Bryan, who received it for the use and benefit of the firm. It is also alleged that defendant has sold the coal underlying the land for more than enough to pay the purchase price of the premises, leaving a profit of over \$600 in money and the entire surface of the land, in all of which the plaintiffs are entitled to share. The defendant, it is charged, denies and repudiates the partnership, and purposes to exclude plaintiffs from any part or share in the property or profits, wherefore they ask to have their rights therein confirmed, and that the partnership be dissolved, its affairs settled, and a division of its assets ordered.

The defendants deny the alleged partnership agreement,

and say that the land was purchased by Edward S. O'Bryan in good faith and in his own right. They also allege that, after Edward S. O'Bryan received such conveyance, plaintiffs recognized his title and ownership, and took from him a written option for the purchase of the coal underlying the surface of said land; making no claim of title or right in themselves, other than such as they obtained by virtue of said option. Defendants also plead the statute of frauds. The Consolidation Coal Company, which was the purchaser of the mining rights in the land, was made a party to the suit; but, by a stipulation entered of record, said company was permitted to apply the unpaid purchase price of said rights in discharge of the debt contracted by Edward S. O'Bryan in the purchase of the land, and deposit the remainder to await the decree of the court in the case. This being done, neither party makes any claim for further relief against the company. A trial upon the merits resulted in a decree for the defendants, and the plaintiffs appeal.

I. The testimony shows that the plaintiffs were, and for a considerable period had been, agents of the coal company, engaged in purchasing or securing options for the purchase of mining rights in lands in the vicinity of the tract in controversy. There is evidence that

1. PARTNERSHIP
CONTRACT:
consideration.

Thomas B. O'Bryan was also in the company's employment, though the precise nature of his service is not made clear by the record. The company desired to secure an option for the purchase of the coal under a tract of one hundred and fifty-five acres of land in Monroe county, owned by one Brown, a resident of Chariton, Iowa. With knowledge of this situation, plaintiffs testify they entered into an agreement with Thomas B. O'Bryan by which the three persons should together purchase the land for the purpose of making a sale of the mining rights to their common employer at such a rate as would leave them a profit, which should be equally divided. That there was some such oral agreement or understanding is quite satisfactorily shown,

but neither plaintiff ever paid, advanced, or invested any sum or amount, in money or service, for the carrying out of the venture. Indeed, it is not claimed that either of them promised or undertook to contribute anything whatever to the alleged partnership enterprise, unless it be the benefit of their confidential relations to the corporation which it was assumed would purchase the coal. They claim and testify that Thomas B. O'Bryan undertook and agreed himself to pay whatever was necessary to secure this land, and take the title in his own name for the common benefit of the partners, and was to be reimbursed for his expenditure out of the proceeds of the sale of the mining rights. Assuming all this to be true, we have to inquire whether a partnership has been established. There is no claim that the alleged agreement contemplated a dealing in real estate generally. It had in view a single transaction concerning a single tract of land, which was to be obtained under circumstances which insured the promoters against loss. True, one of the plaintiffs testifies to an understanding that profits should be shared and losses borne in equal shares, but the record makes it very certain that this was one of those rarely fortunate transactions in which no risks were to be taken by any one. Indeed, it appears to have been what in street parlance would be called a "cinch" for all concerned, except, of course, the coal company. Moreover, as we have already noted, the plaintiffs neither contributed nor undertook to contribute anything whatever to the joint enterprise. The purchase was to be made by Thomas B. O'Bryan in his own name, and with his own money, and the property thus acquired was to be held and finally conveyed by him for the joint benefit of all. Without going into any inquiry as to the essentials of a partnership, we have to suggest that there is room for serious doubt whether the facts, even upon the plaintiffs' version, are sufficient to bring the relation of the parties within any accepted definition of that term. If, after the conversation in which it is claimed the agreement

was made, O'Bryan had expressly repudiated the promise, and refused to proceed farther or to purchase the land, would an action for damages lie at the instance of the plaintiffs? In our judgment, it would not. If for no other reason, the lack of consideration for the promise would be a sufficient reason for denying its enforceable character. It can hardly be claimed to be a case of mutual promises, in which each serves as a consideration for the other, for there seems to have been no mutuality of obligation, but, rather, a naked promise by O'Bryan to buy the property upon his own personal responsibility, and, when the deal was completed by turning over the mining rights to the company, or to one of the plaintiffs as its agent, to share the profits with his alleged partners.

II. Whatever may be held as to the validity or character of the agreement, it did not of itself vest the plaintiffs with any right or interest in the land. At that time the land

2. PARTNERSHIP
CONTRACT:
resulting
trust.

was owned by a third party, who was under no obligation to sell or convey it to the partnership or to any of its members. Until O'Bryan or some other member of the alleged firm should purchase it, the partnership had no capital, owned no property, possessed no assets. In short, the whole fabric rested upon the possible purchase of the land by Thomas B. O'Bryan from its then owner, Brown, who was not a party to the deal, and presumably had no knowledge of it. But Thomas B. O'Bryan did not purchase it. It was purchased by Edward S. O'Bryan, from whom the plaintiff Cobbs took the mining option for the coal company. Edward S. O'Bryan was under no obligation not to buy the land in his own right, or to obtain the title for the benefit of the plaintiffs or Thomas B. O'Bryan. Appellants contend that the purchase was actually made by the latter, and the title taken in Edward in trust for the partners. This is explicitly denied by both defendants, who testify that the money paid at the time of the purchase was the money of Edward, who also gave the notes

and mortgage for the deferred payments, executed the subsequent option for sale of mining rights, and later conveyed the land to his father for a valuable consideration. There are circumstances which may justify a suspicion that he was acting in the interest of his father from the outset, but nothing which amounts to proof of that fact. So far as the record discloses, Edward S. O'Bryan had no knowledge or notice of the alleged partnership agreement, or of the plaintiffs' claimed interest in the property or its proceeds, until long after the land was purchased by him. He was of adult years, and the simple fact that he was his father's son is not sufficient to justify us in placing a fraudulent construction upon his acts. There is no evidence, whatever that he took the title under an express trust in favor of the partnership, nor did he have any such relation to the partnership that a resulting or constructive trust can be raised in its favor.

These conclusions render it unnecessary for us to consider the effect, if any, which the statute of frauds may have upon the rights of the parties.

We are satisfied with the correctness of the conclusions of the trial court, and the decision appealed from is *affirmed*.

WILLIAM FLOCKHART V. HOCKING COAL CO., Appellant.

Master and servant: ASSUMPTION OF RISK: EVIDENCE. Where the unsafety of the place to work provided by the master can be discovered through a casual inspection by the servant, he is presumed to have a knowledge thereof and assumes the risk incident thereto. Under the evidence, it is held that a mine employé assumed the risk arising from an unballasted track.

Appeal from Monroe District Court.—HON. M. A. ROBERTS,
Judge.

SATURDAY, FEBRUARY 11, 1905.

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SUIT to recover damages for personal injuries. Trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals.—*Reversed.*

Geo. W. Seevers, A. C. Parry and T. B. Perry, for appellant.

N. E. Kendall, for appellee.

SHERWIN, C. J.—At the time the plaintiff was injured he was a driver in the defendant's mine. He was an experienced driver, and had worked for the defendant in that capacity for several months before the injury was received. The track on which he was hauling coal at the time was a new one, having been put in use for that purpose only the morning of the day of the accident. There was a knuckle or high point in the entry through which this track ran, and, in taking a trip of loaded cars out, it was necessary to apply a sprag or brake to the car wheels before the trip had passed entirely over the knuckle. The plaintiff had made one round trip over this track, and had gone back to the face of the mine, and was returning to the bottom thereof with a trip of two loaded cars. When he reached a point a few feet from the knuckle, he stopped and spragged his trip for the purpose of controlling it when he reached the knuckle. He then remounted the trip, and went on until the forward car was over the knuckle, when he jumped down in front of that car, and undertook to stop the trip by bracing himself against it; but his toe caught under one of the rails, and he was thrown by the car and injured. The petition alleges that the track was not ballasted at the knuckle or on either side thereof for several rods, and that the defendant was negligent because of its failure to ballast and level it up with dirt or other material.

The defense was the assumption of the risk by the plaintiff and his contributory negligence. There is no serious

disagreement between counsel as to the law governing the case, and it presents but one fact question of importance. It is conceded by the appellant that it was its duty to furnish a reasonably safe place for the plaintiff to work, and there was evidence tending to show a failure in that respect. On the other hand, it is conceded by the appellee that it was his duty to exercise ordinary and reasonable care and observation in the use of the track. The ultimate question for determination is whether it should be said, as a matter of law, that the defendant did not use such care. There was no direct and positive evidence that the plaintiff knew that the track was unballasted, nor was such evidence necessary to defeat a recovery. The true test in cases of this kind is whether he ought to have known its condition, for, although he did not in fact know it, if he might have known it by the exercise of ordinary or reasonable care, it amounts to actual knowledge. *Haugh, Adm'r, v. C., R. I. & P. Ry. Co.*, 73 Iowa, 66; *Shebeck v. Nat. Cracker Co.*, 120 Iowa, 414; *Quinn v. Ry. Co.*, 107 Iowa, 710; 4 Thompson on Negligence, section 4647. The servant may assume that the master has provided a safe place where the defect is so hidden that its discovery would require special inspection. But where the defect is apparent to casual inspection, he is presumed to have knowledge thereof. *Quinn v. Ry. Co., supra*, and cases cited.

The plaintiff's mule was hitched to a singletree at the end of a tail chain that was from four to six feet long, and the opposite end of which was fastened to the car at a point about a foot higher than the rails. When riding the trip, the plaintiff placed one foot on the tail chain, and the other on the end of the car; and during all of the time in question he had a lighted lamp fastened to the front of his cap, which enabled him to see his mule and his trip. When he reached the knuckle with his first trip out in the morning, two other workers in the mine were there, each of whom also carried a lighted lamp, and one of whom spragged the

wheels for him just back of the knuckle. When the first car of this trip passed over the knuckle, the plaintiff jumped down in front of it at almost the identical spot where he alighted at the time he was hurt, and stopped it for one of the other men to finish spragging it. He testified that he did not know before the accident that the track was not ballasted; that he had not looked at it to see whether it was or was not ballasted, because it was not his business to do so; and that he could have seen its condition when riding on his trip and when spragging if he had looked at it. Giving to his testimony the most favorable construction that can be claimed for it, it is apparent that the most casual inspection or observation of the track would have disclosed its unballasted condition, and the possible danger to be apprehended therefrom. The plaintiff was a driver of long experience, and knew the danger lurking in an imperfect track, and yet he shut his eyes and refused to see the obvious and plainly apparent condition which he alleges was the cause of his misfortune. We are of the opinion that his own testimony conclusively shows that he did not exercise the degree of care required by the law, and that the verdict should not stand.—*Reversed.*

THE COLUMBUS JUNCTION TELEPHONE COMPANY V. D. W.
OVERHOLT, Appellant.

Justices of the peace: CHANGE OF VENUE: WAIVER OF ERROR. It is error for a justice to grant a change of venue after the determination of a motion to strike from the answer and to make it more specific, as the same constitutes a commencement of the trial within the meaning of Code, section 4502; and the error is not waived by proceeding to trial.

Appeal from Louisa District Court.—HON. JAMES D.
SMYTH, Judge.

SATURDAY, FEBRUARY 11, 1905.

APPEAL from a judgment determining that a change of venue from one justice of the peace to another was improperly granted.—*Affirmed.*

C. A. Carpenter, for appellant.

Molsberry & Johnson, for appellee.

SHERWIN, C. J.—This suit was commenced before a justice of the peace, and on the return day the defendant appeared and filed an answer. A motion to strike from the answer and to make it more specific was thereupon filed by the plaintiff, and was sustained. The defendant then filed a substituted answer, and immediately thereafter a motion for a change of venue, which was sustained, and the case was sent to the next nearest justice, where a trial was had and a judgment rendered for the defendant.

The controlling question is whether the change was rightly granted, and its solution depends on the construction of section 4502 of the Code, which provides that "either party, before the trial is commenced, may have the place of trial changed," etc.; and the ultimate question is, was the trial commenced, within the meaning of the statute, when the issue of law raised by the motion to the answer was heard and determined by the court? We think the question must be answered affirmatively. Section 3649 of the Code defines a trial as the "judicial examination of the issues in an action, whether they be issues of law or of fact." And this means a judicial examination of an issue of law raised by a demurrer or plea. *Mathews v. Clayton County*, 79 Iowa, 510. Indeed, the statute (Code, section 3647) says that an issue arises in the pleadings where a conclusion of law is maintained by one party and controverted by the

other, and motions and demurrers are defined as pleadings by section 3557 of the Code. It is therefore very apparent that the hearing of the motion assailing the answer was a commencement of the trial within the meaning of the statute. This was directly held under a similar statute in *McKenney & Delashmatt v. Hopkins*, 20 Iowa, 495. Nor is the rule inconsistent with the cases of *Lyne v. Hoyle*, 2 G. Greene, 135, and *Marshall and McKee v. Kinney*, 1 Iowa, 580. The first of these cases was decided under a statute which permitted a change of venue upon an application filed before the trial was submitted to the justice. The application was made after a continuance but before the trial of any issue, and was refused, and the ruling was held to be error. In the *Marshall Case* there had been a trial to a jury and a disagreement, and it was held that an application for a change of venue, made before another trial was commenced, was in time. The contention that a distinct and separate trial was had and completed when the justice heard and ruled on the motion can hardly be sustained. The trial before that justice was, of course, ended when he granted the change of venue. Had there been no change granted, however, the hearing had on the motion would have been a part of the trial of the entire issue between the parties. Error in granting a change of venue is not waived by going to trial. *McCracken v. Webb*, 36 Iowa, 553; *Jones v. C. & N. W. Ry. Co.*, 36 Iowa, 68.

² The judgment is *affirmed*.

JAMES M. CASTNER V. CHICAGO, BURLINGTON & QUINCY
RAILROAD Co., Appellant.

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| 142 | 583 |

Evidence: ADMISSIONS. In an action against a railway company

- 1 for damage caused by fire, it is competent to permit plaintiff to testify that a letter written by him to the company definitely stating the amount of his claim was in fact written to secure a

compromise and not intended as an accurate statement of his damage, as affecting its weight as an admission.

Proof of admissions: INSTRUCTIONS. Where there is both oral
2 and written evidence of an admission, an instruction in relation to the weight to be given the same should point out the distinction between the two forms of proof; and where the jury is told that oral evidence of an admission should be received with caution, they should also be instructed that when the admission is clearly identified such evidence is often of a satisfactory nature.

Same. A deliberate written statement over a party's own signature
3 inconsistent with a subsequent claim is provable not merely to discredit his testimony but as substantive proof against him, and is not subject to the rule governing verbal admissions.

Damages: EVIDENCE. Where the plaintiff sought to show that his
4 meadow had been permanently injured by fire which consumed the grass, it was competent for defendant to prove that land some distance away but similarly situated which had been burned over at about the same time was uninjured.

Appeal from Monroe District Court.—HON. C. W. VERMILLION, Judge.

MONDAY, FEBRUARY 13, 1905.

ACTION to recover damages for fire set out by defendant's locomotive engine. Verdict for \$463. From judgment on the verdict, defendant appeals.—*Reversed.*

T. B. Perry and N. E. Kendall, for appellant.

Clarkson & Bates, for appellee.

McCLAIN, J.—The claim of plaintiff was for the destruction of standing grass, two stacks of straw, and a fence, and for permanent damages to the meadow on which the grass was standing. On behalf of defendant there was evidence tending to show admissions made by plaintiff soon after the fire, fixing the amount of his damage at \$273:

and it was further shown that two weeks after the fire he wrote to the division superintendent of defendant the following letter, which related to his damage from the fire in question:

"Dear Sir: July 13th, 1901, fire from freight train destroyed over 30 tons of hay for me, together with two straw stacks, 304 rails, and 15 or 20 posts; altogether of the value of near 300.00. It was reported at the time by your section boss, and I have been waiting for some one to come and see after my loss."

Over defendant's objection, the plaintiff was allowed to testify as a witness that this letter did not state the full amount of his actual loss, and that it was written for the

1. EVIDENCE: purpose of securing from defendant a compromise and avoiding litigation, and that it did not include any claim for permanent damage to the meadow. It is to be noticed also in this connection that the plaintiff in his testimony estimated the number of tons of hay destroyed as larger than the number stated in the letter and in the oral claims which he made immediately after the fire in conversation with the officers of the defendant. The oral demands and the letter were not, of course, conclusive on plaintiff as to the amount of his damage, and did not estop him from showing a larger amount of actual loss; but they were admissible as tending to contradict the truthfulness of the claims made in his testimony on the stand. It was sought, therefore, to lessen the effect of the statements in the letter by having the plaintiff testify that it was written by way of offering a compromise. If, in fact, it was an offer of compromise, then it was not entitled to any consideration as against the proof of the actual amount of damage, for it is, of course, well settled that an offer made for the purpose of a compromise of litigation is not an admission. But the claim of defendant is that there is nothing in the letter itself to indicate that it contains an offer for the purpose of compromise merely. It purports to state the amount of plaintiff's

claim, and there is nothing in it to indicate that he was claiming less than the full amount of his loss for which the defendant was liable. But, as affecting the weight of the letter as an admission, we think it was competent to show that it was written with the uncommunicated intention of securing a settlement, and not as a true statement of plaintiff's damages.

The only instruction given by the court with reference to the letter and the oral statements of plaintiff to the defendant's agents, made soon after the fire, was the following:

(11) The admission of a party to a suit, when made deliberately, and with full understanding of the matter to which such admission relates, often affords satisfactory evidence; but, as a general rule, the statements of witnesses as to the verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to imperfections and mistake. But any statement made by the plaintiff as to the amount of his alleged damages which was at the time stated to be an offer of compromise, cannot be considered as an admission of plaintiff of the amount of his alleged damages.

The instruction is plainly erroneous and misleading in referring to the effect to be given to the letter and oral admissions. In the first place, it draws no distinction between oral admissions established only by the testimony of a witness who heard them, and written admissions, confessedly made by the party himself; that is, established by writing over his own signature. As to oral admissions the rule of the instruction is not open to serious criticism, althought it tends to deprive them of the weight to which they are entitled when clearly proven. The language of Greenleaf, which is to some extent embodied in this instruction, is in full as follows:

With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the

party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say: But where the admission is made and precisely identified, the evidence it affords is often of the most satisfactory nature. 1 Greenleaf Evidence, Section 200.

The thought of the last sentence quoted from Greenleaf is not given full force by the instruction, which states that, as a general rule, "the statements of witnesses as to verbal admissions of a party should be received by the jury with great caution." And the instruction is especially objectionable under the evidence which is found in this record, for the plaintiff does not deny that in his conversations with the agents of defendant soon after the fire he fixed his damage at \$273. We think that such oral admissions, being substantially made out by the testimony of plaintiff, as well as that of defendant's witnesses, were entitled to very considerable weight as against his subsequent testimony that the total amount of his loss from the same fire was over \$700.

The instruction is, however, wholly inadequate and misleading as to the weight to be given to plaintiff's letter containing a deliberate statement over his own signature as to the amount of his loss. Such a written ad-

& SAME.

mission is provable not merely as discrediting the testimony of the party as a witness, but as substantive evidence against him. 1 Greenleaf, Evidence (16th Ed.) section 170a. As stated by Prof. Wigmore in his recent treatise: "Anything said by the party may be used as against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony." 2 Wigmore, Evidence, section 1048. "Admissions are receivable primarily because of their inconsistency with the party's present claim, and irrespective of their credit as asser-

tions." Id. section 1049. "An admission * * * is nothing but a piece of evidence discrediting the party's present claim, and tending to prove the fact of its incorrectness." Id. section 1056. It is plain, therefore, that a written admission shown to have been made by the adverse party, and inconsistent with his claim, is substantive evidence, and not subject to the rule which is applicable to verbal admissions established only by the testimony of witnesses with reference to statements in general which would otherwise be hearsay, and which are, by Greenleaf's language, subject to some discredit because of the uncertainty of such testimony. The instruction of the court is open to the same objection as the one criticised in *Hawes v. Burlington, C. R. & N. R. Co.*, 64 Iowa, 315, on the ground that it contained no direction as to what the rule would be if the admission was deliberately made and understood at the time.

Plaintiff sought by his own testimony and the testimony of other witnesses to show that his meadow had been permanently damaged by the fire which consumed the grass standing thereon, and defendant sought to meet this evidence by the testimony of a witness who owned land some miles distant, which had been burned over at about the same time of year, and under similar circumstances, that his meadow was not permanently injured by such burning, but was better the next season than it had been before. This testimony, if admitted, would have tended to show that plaintiff's loss, so far as his meadow was concerned, did not exceed the value of the grass standing thereon which was destroyed, and for which he asked compensation on the basis of its value for hay. The court sustained an objection to the admission of such testimony on the ground that the two pieces of land were not shown to be similarly situated. But we think this objection was not well taken. The admissibility of this evidence as bearing on the question whether the burning of standing grass on a meadow permanently impairs its value, by the

4. DAMAGES:
evidence.

destruction of the grass roots, did not depend on whether the two pieces of land were in proximity to each other, but upon similarity of conditions. We think that the testimony as to the condition of the witness' land when it was burned tended to show that it was substantially in the same condition, with reference to the damage which would be inflicted upon it by burning the grass standing thereon, as the land of plaintiff, as it was described by himself and other witnesses produced by him. The testimony should therefore have been received. *Bradley v. Iowa Central R. Co.*, 111 Iowa, 562; *Swanson v. Keokuk & W. R. Co.*, 116 Iowa, 304.

It is evident that the errors above referred to could have affected only the amount which the jury should allow plaintiff in excess of the amount stated in his admissions, for in his oral and written claims he said nothing as to permanent injury to his meadow. We do not say that he was not entitled to recover for such permanent injuries, notwithstanding his injuries may not have been apparent or known to him at the time his claims were first made—that is, within two weeks after the fire; and, if the competent evidence offered by the defendant had been received, and the effect of plaintiff's admission properly explained, it may well have been that the jury could and would have allowed to the plaintiff more than the amount which he first claimed. But as to the number of tons of hay which could have been gathered from plaintiff's land had the grass not been destroyed by fire, and as to the value of the hay which was thus destroyed, we think the admissions were entitled to great weight. However, as the errors committed related only to the amount which plaintiff should recover beyond the amount originally claimed by him, we will allow the plaintiff, if he so elects, to have judgment in this court for \$300 and interest from the time of the fire. If he does not elect within 60 days from the filing of this opinion to take judgment for this amount, then the case will be remanded for a new trial. The costs of the appeal will be taxed to the appellee. — *Reversed.*

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| 133 | 60 |

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| 126 | 588 |
| 138 | 531 |

MINNIE GREGORY, ET AL., Appellants, v. BENJAMIN F.
BOWLSBY, ET AL., Appellees.

Pleading: FAILURE TO PLEAD TO AN AMENDMENT. Where the parties

- 1 proceed to trial without answer or other pleading to an amended petition, the plaintiff cannot afterwards claim that defendant is in default or that the allegations in the amendment should be treated as confessed.

Trusts: PARENT AND CHILD. Where a father having the confidences

- 2 of his children who are members of his family, by promises which he did not intend to perform induced them to convey to him their interest in land, a court of equity will decree a constructive trust in their favor.

Presumption of fraud. The mere relationship of a parent and

- 3 adult child will not constitute such a state of confidence as to raise a presumption of fraud, but it will be considered in connection with other facts and circumstances for the purpose of establishing a trust.

Appeal from Madison District Court.—HON. EDMUND
NICHOLS, Judge.

MONDAY, FEBRUARY 13, 1905.

SUIT in equity to establish a trust in certain lands the legal title to which is in the defendants. The trial court dismissed plaintiffs' petition, and they appeal.—*Reversed.*

Steele & Robbins, for appellants.

John A. Guiker and *A. W. Wilkinson*, for appellees.

DEEMER, J.—This case was once before us on a demurrer to the petition. 115 Iowa, 327. After the remand to the district court plaintiffs amended their petition by

pleading that they had but shortly before the execution of the

1. PLEADINGS: deed under which defendant B. F. Bowlsby
failure to claims attained their majority; that plaintiff
plead to an
amendment.

Minnie Gregory and her husband were living upon the premises as members of the family of defendant Bowlsby, and that plaintiffs Frank Bowlsby and Bertha Bowlsby also resided upon the premises, and were members of the same family; that plaintiff C. C. Bowlsby, with his wife, were also residing upon the premises, near the house of the defendant Bowlsby; that plaintiffs May and Frank Davidson had only recently been married, and that down until the time of her marriage May had resided with her father, B. F. Bowlsby, defendant; that defendant enjoyed the confidence and respect of the plaintiffs, and on account of the friendly family relations existing between them he (B. F.) had great influence over the plaintiffs, and each of them; and that, but for this influence, plaintiffs would not have deeded the lands to B. F. Bowlsby. No answer or other pleading was filed in response to this, but the parties went to trial, and the case proceeded as if an answer had been filed. Such being the situation, plaintiffs are in no position to claim that defendants were in default, or that the allegations of this amendment should be treated as confessed. *Long v. Valleau*, 87 Iowa, 675; *Medland v. Walker*, 96 Iowa, 175.

The law of the case, except in so far as the amendment tendered a new issue, was settled in the former opinion. There is no claim of any resulting trust, and, if plaintiffs

2. TRUSTS: recover, it must be on the theory of a construct-
parent and
child. ive one growing out of the fraud of the de-
fendant Benjamin F. Bowlsby, or of his having

taken advantage of some confidential relation existing between himself and his children. The record shows that all the matters recited in the petition which was before us on the former appeal, and which were then held sufficient to constitute a constructive trust, are true, unless it be that de-

fendant intended to perform his promise made to the plaintiffs, his children, as an inducement for the conveyance to him. That he made the promises charged is clearly shown by the overwhelming weight of the testimony, and really not denied by the defendant. But it is said that, if he made any promise, he at the time intended to perform it, or at least plaintiffs have not shown that he did not intend to do so. We are constrained to hold that his promises were the direct inducement for the conveyances; that he did not intend to perform or keep them, but was anxious to get the title to the land in his own name; that he secured the conveyances from his children, some of whom were barely of age, because of the confidence they reposed in him, and of his influence over them; that he asked some of them to keep the matter secret for fear of a consultation between them which might thwart his purposes; that he was the active agent in securing the conveyances; that he paid no consideration therefor, but secured the same on the strength of the agreement charged; that he hurriedly brought the parties together, had a lawyer of his own choosing present with a deed already prepared; that, after receiving the deed, and shortly before his second marriage to his codefendant in this case, he misrepresented the agreement between him and his expectant second wife for the purpose of carrying out his intent to defraud; and that upon the whole case the equities are so strongly in plaintiffs' favor that they should have had a decree establishing the alleged trust, and confirming their several interests in and to the land. No one should be permitted to use the statute of frauds as an instrument of fraud, and courts will not permit a person, through the influence of a confidential relation, to acquire title to property, or to obtain an advantage which he cannot conscientiously retain. *Wood v. Rabe*, 96 N. Y. 414.

On the former appeal we held that the mere relationship between a parent and his adult children did not constitute such a state of confidence as to create a presumption of

fraud or undue influence, and this rule we still adhere to; but there may be such facts shown in addition to the relationship as to create a condition of confidence, which should be considered by a court of equity in such cases as this. As to some, if not all, of the plaintiffs, this was shown here, to meet the allegations of the amendment to the petition. The father was the natural guardian of his children before they became of age; and as to some of them the influence thereby obtained presumptively continued, and was in force when the conveyance was made. We do not say that the relationship of confidence was such here as to cast the burden upon the defendants to show that the conveyances were fair, just, and without fraud. What we do hold is that this relationship should be considered in reaching a proper solution of the question as to whether or not there was a trust *ex maleficio*. The defendant's attitude toward his children, his statements and conduct since he received the conveyances, his deeding a part of the land to his codefendant, his denial of the agreement which is clearly proved, his attempt to influence his children to desist in their efforts to recover back the title to the land, these and many other matters should be considered in arriving at an equitable determination of the case. Of course, defendant's mere denial of the alleged agreement does not constitute such a fraud as will take the case out of the statute of frauds; but this denial may be considered with other circumstances in arriving at a correct solution of the issues involved. After a careful consideration of the entire record, we are satisfied that plaintiffs have made out their case, and that a decree should be entered in their favor. The defendant B. F. Bowlsby owned one-third of the land in his own right, which he derived through his first wife. This he had a right to convey to his codefendant, and the conveyance to her of an undivided one-third should not be disturbed. But the other two-thirds should be decreed to be held by defendant B. F. Bowlsby

1. PRESUMPTION
OF FRAUD.

for such of his children as are parties to this suit, each owning an undivided one-tenth thereof. From the record made upon the trial of the case in the court below we are unable to determine whether or not defendant B. F. Bowsby or his wife, or either of them, should be charged with a part of the rents and profits of the land, and the case must be remanded to the trial court for a determination of that matter. And if it be found that plaintiffs should have a part thereof, then an accounting should also be had as to taxes paid by the defendants, or either of them, and as to any other matters which should be considered in making up the account.

For the reasons pointed out, the decree must be reversed, and the cause remanded for one in harmony with this opinion.— *Reversed and remanded.*

J. E. KLEPPER, Appellant, v. CITY OF KEOKUK, Appellee.

Default judgments: SETTING ASIDE. An inferior court has jurisdiction to set aside a default judgment, notwithstanding a transcript has been filed in the district court.

Judgments: EFFECT OF TRANSCRIPT. The filing of the transcript of a judgment in district court makes it a judgment of that court under Code, section 273, simply for the purpose of enforcement.

Setting aside defaults. Setting aside a default to permit a defense on the merits is a matter largely within the discretion of the trial court, and its order will not be disturbed except in cases of abuse.

Affidavit of merits. In an action for a personal injury, an affidavit of merits in support of a motion to set aside a default, which alleges a belief that the accident was the result of plaintiff's negligence and not that of defendant, is sufficient without setting out all the facts upon which the conclusion rests.

Appeal from Keokuk Superior Court.—HON. W. L. MCNAMARA, Judge.

MONDAY, FEBRUARY 13, 1905.

ACTION to recover damages for a personal injury. Judgment by default was entered against the defendant city for want of an appearance, and such was subsequently set aside on motion. From the order setting aside the default and judgment, the plaintiff appeals.—*Affirmed*.

F. M. Ballinger, for appellant.

Hazen I. Sawyer and *H. R. Collins*, for appellee.

BISHOP, J.—The default judgment was entered by the superior court on April 11, 1904, and a transcript was at once taken by plaintiff, and filed in the office of the clerk of the district court of Lee county. The motion by defendant to set aside the judgment was filed on April 13, 1904, and during the term of court at which the judgment was entered.

I. The first contention presented by appellant is that the court below was without jurisdiction to set aside the default, in view of the fact that a transcript of the judgment had been filed in the office of the clerk of the district court. This contention cannot be sustained. The superior court has jurisdiction concurrent with the district court in all civil matters save in certain respects not material to be here considered. Code, section 260. And the statutes governing procedure in the district court apply to such courts, unless otherwise specially provided. Code, section 263. Judgments by default entered in the district court may be set aside on such terms as to the court may seem just, application being made therefor during the term at which the judgment was entered. Code, section 3790.

Counsel for appellant relies, however, upon the provisions of Code, section 273, relating to superior courts, and which are as follows: "Judgments in said courts may be

made liens upon real estate * * * by filing transcripts of the same in the district court, as provided in this Code in relation to judgments of justices of the peace, and with equal effect, and from the time of such filing they shall be treated in all respects as to their effect and mode of enforcement as judgments rendered in the district court as of that date, and no execution can thereafter be issued from the said superior court on such judgments," etc. Code, section 4537, authorizes the filing in the district court of transcripts of judgments entered by justices of the peace, and the succeeding section provides that from the filing and entry of the transcript the judgment "shall be treated in all respects and in its enforcement as a judgment obtained in the district court. No execution shall issue from the justice's court after the filing of such transcript." The filing of a transcript in the district court has to do with the matter of the enforcement of the judgment; the judgment becomes a judgment of the district court for such purpose, and such only. It was never intended by the statutes thus providing for a manner of enforcement to forbid the court entering the judgment from controlling the same in respect of other matters authorized by law.

Not only has the superior court power to set aside defaults and grant new trials, but a justice of the peace may set aside a default judgment at any time within six days after being rendered. Code, section 4513. To say that the right of a judgment defendant may be cut off by the act of the judgment plaintiff in taking a transcript is to render nugatory such statute provisions. However meritorious the right, the district court could grant no relief, as it has jurisdiction only to enforce. And the argument of counsel for appellant, should we follow it, would lead to a holding that no appeal could be allowed after a transcript has been taken. If all connection of the court rendering the judgment was cut off by the transcript, and such

judgment became in all respects as if originally entered in the district court, there would be no way to reach the court charged with the commission of error. The district court would have no record upon which an appeal might be predicated, or upon which to try the case anew should there be an order for remand and new trial. It must be apparent that the contention of appellant is without force. The cases of *Little v. Devendorf*, 109 Iowa, 47, and *Oyster v. Bank*, 107 Iowa, 39, are not in conflict with the conclusion thus reached.

II. It is next urged in argument by appellant that no sufficient excuse for the default was shown to authorize the order setting it aside. The subject-matter is very largely committed to the discretion of the trial judge, and we will not interfere except in a clear case of abuse. While negligence pure and simple on the part of the defendant or his attorney will not be sufficient to excuse a default, yet, short thereof, many circumstances and conditions may be accepted when shown, although not wholly blameless. A busy lawyer will occasionally mislay papers, or the intensity of interest in one case may cause him to forget momentarily what is due from him in respect of another. It is for the trial court to judge of the merits of the excuse in all such cases. *Ordway v. Suchard*, 31 Iowa, 487; *Jean v. Hennessy*, 74 Iowa, 349; *Barto v. Electric Co.*, 119 Iowa, 179. In the instant case it is reasonably made to appear that the failure to enter an appearance was an oversight due to the papers in the case getting misplaced. It also appears that a change in the incumbency of the office of city attorney took place about the time, from which some confusion resulted. In any event, the record does not warrant us in finding that the trial court abused its discretion.

III. As a prerequisite to the setting aside of a default, the statute requires that the defendant file an affidavit of merits, and plead issuably forthwith. Here the defendant

answered, denying generally. There was also filed the affidavit of the city attorney to the effect that he had made an investigation into the facts and circumstances of the accident complained of by plaintiff, and therefrom believed that such accident was not caused by any negligence on the part of defendant or its officers or agents, but that the same was due solely to the negligence of plaintiff. This was sufficient. True, the affiant states his belief merely, but it must be remembered that a finding of negligence or of the absence thereof is nothing more or less than a conclusion, and it would be unreasonable to require the setting forth of all the facts and circumstances, and the inferences and presumptions to be drawn therefrom, upon which the conclusion was made to rest. Our attention is not called to any authority which imposes such a requirement.

From what we have said, it follows that the order appealed from must be, and it is, *affirmed*.

C. P. MEREDITH, Appellant, v. SAMUEL LOCHRIE and A. M. LOCHRIE.

Recovery of rents and profits by junior mortgagee. A junior mortgagee or his assignee, whose rights have not been foreclosed, may redeem from the foreclosure of a prior mortgage and recover the rents and profits less permanent improvements if any, but such rents must be determined and recovered in the action for redemption and not by a separate suit, unless a sufficient excuse for the failure be shown.

Appeal from Clark District Court.—HON. H. M. TOWNER, Judge.

MONDAY, FEBRUARY 13, 1905.

SUIT to recover for the use of land. There was a

judgment for the defendants, from which the plaintiff appeals.— *Affirmed.*

De Lano & Meredith, for appellant.

W. S. Hedrick, for appellee.

SHERWIN, C. J.— There were three mortgages on the land in question. The first one was foreclosed, and the defendants herein, who were the holders of the second mortgage, redeemed therefrom, and took a sheriff's deed for the land in November, 1899. They thereafter brought suit against the holder of the third mortgage, he not having been made a party to the foreclosure of the first, and on the 6th day of April, 1900, a decree was entered fixing the amount to be paid by Johnson, the third mortgagee, to make redemption, and giving him until August 6, 1900, to pay the same. The plaintiff, as the assignee of Johnson, redeemed in accordance with the decree, and received a quitclaim deed from the appellees. He thereafter brought this suit to recover the rents and profits of the land for the years 1899 and 1900. It is undoubtedly the rule that a subsequent mortgagee, whose rights have not been foreclosed, may redeem and demand from the mortgagee in possession an accounting for the rents and profits less permanent improvements. *Spurgin v. Adamson*, 62 Iowa, 661; *Ten Eyck v. Casady*, 15 Iowa, 524; *Barrett v. Blackmar*, 47 Iowa, 565. But in the last case cited it was held that such claim must be made in the action for redemption. In the case at bar the amount necessary to redeem was agreed upon, and it was so entered in the decree, and the presumption is conclusive that the amount thus found was the amount due after allowing Johnson all proper credits. The law abhors a multiplicity of suits, and neither Johnson nor his assignee can now maintain an action for rents and profits which might have been recovered in the former suit, unless a sufficient

excuse for the failure be shown. The defendants received rent for the year 1900, and it is said that they should account therefor in this action. If it be conceded that the decree did not determine the rights of the parties at the time redemption was in fact made—a question we do not determine—the evidence shows that the amount of rent received was expended in permanent improvements on the land, and under the rule of the cases cited the plaintiff cannot recover therefor.

We think the judgment right, and it is *affirmed*.

COLEMAN IMPLEMENT COMPANY, Appellant, v. R. W. STRONG
and CHARLIE STRONG.

Chattel mortgages: DESCRIPTION OF PROPERTY. A description in a
1 chattel mortgage as "one bay horse twelve years old named
Mike, one bay mare, white strip in forehead, named Mollie,
twelve years old," the mortgage also stating from whom purchased, the residence of the mortgagors and that the property was in their possession there to remain until default in payment or an attempted sale, was sufficiently definite to authorize its admission in evidence.

Identification of property. Where the description in a mortgage is
2 sufficiently definite to justify its admission in evidence, the property may then be identified by extrinsic evidence.

Replevin: RECOVERY FOR USE OF PROPERTY. A defendant in replevin
3 who elects to take a money judgment and proves the value of the property at the time it was taken under the writ, cannot recover for its use from that time.

Appeal from Monona District Court.—HON. WILLIAM
HUTCHINSON, Judge.

MONDAY, FEBRUARY 13, 1905.

SUIT to recover the possession of personal property.

There were a verdict and a judgment for the defendants. The plaintiff appeals.—*Reversed*.

C. E. Underhill, for appellant.

Prichard & Newby, for appellees.

SHERWIN, C. J.— The plaintiff's right to the possession of the property in question was based on a chattel mortgage given to it by Henry and Elizabeth Guy, which was duly recorded in Monona county. After the mort-

1. DESCRIPTION
OF PROPERTY. gage was recorded, the defendants bought the property of a third person, and took possession thereof. The court held that the description of the property in the mortgage was insufficient to impart constructive notice to the defendants, and excluded the mortgage from the consideration of the jury. The description of the property, so far as material here, was as follows: "Also one bay horse twelve years old, named Mike, one bay mare, white star in forehead named Mollie, twelve years old, the last named animals being the ones purchased by Henry Guy from F. E. Smith of Onawa, Iowa." The mortgage stated that the Guys were residents of West Fork township, in said county, and that they were lawfully possessed of the horses. It also stipulated that the mortgagors should retain possession of the property until default was made in the payment of the notes secured thereby, or until the mortgagors sold or attempted to sell the property. The foregoing description is fully as specific and certain as many which have heretofore been held sufficient. It describes the horses, and states from whom they were purchased. It gives the residence of the mortgagors as in one of the political subdivisions of the county of Monona, and fairly states that the property was at the time in their possession. Taken as a whole, there can be no question as to the sufficiency of the description, and it was error to hold otherwise. *Preston v. Caul*, 109 Iowa,

443; *Shellhammer v. Jones*, 87 Iowa, 520; *Brock v. Barr*, 70 Iowa, 399; *Wheeler v. Becker*, '68 Iowa, 723; *Wells v. Wilcox*, 68 Iowa, 708; *Smith v. McLean*, 24 Iowa, 322.

The appellees cite many cases which hold that the descriptions therein considered were not sufficient, but an examination of the cases will show that none of the mortgages

2. IDENTIFICATION OF PROPERTY.

under consideration were as specific as this one. The mortgage should have been received in evidence, and it would then have been competent to identify the property by extrinsic testimony. *Smith v. McLean*, *supra*; *Rowley v. Bartholemew*, 37 Iowa, 374.

The court permitted the defendants to show the value of the use of the horses after they were taken on the writ of replevin, and it is contended that, because they elected

3. REPLEVIN: recovery for use of property.

to take a money judgment for the value thereof, they were not entitled to recover for their use. The value of the horses at the time they were taken on the writ was proven, and it is apparent therefrom that the appellees elected to treat the conversion as taking place at that time, in which event they were not entitled to recover for the use. *Powers v. Benson*, 120 Iowa, 428; *Newberry v. Gibson*, 125 Iowa, 575.

For the errors indicated, the judgment is *reversed*.

MILDRED SCHWARTZ JORDAN, Appellee, v. L. L. CATHCART, Appellant, and TODD CHRISTOPHERSON, RUSS W. CARTER, and the MERCHANTS' NATIONAL BANK, Defendants.

Fraudulent conveyances: EVIDENCE. Where a deed is procured 1 from one of inexperience for an inadequate consideration and as the result of an undue influence growing out of a confidential relationship, it will be set aside as fraudulent. Evidence considered and held to show fraud.

Innocent purchaser: FRAUD. One who purchases property with a
2 knowledge that his grantor procured the title thereto through
fraud in which he himself participated, is not entitled to protection
as an innocent purchaser.

Fraud: BURDEN OF PROOF. One who purchases land from a member
2 of his family with whom he occupies a confidential relation,
has the burden of showing good faith.

Innocent purchaser: ATTORNEY AND CLIENT. An attorney who has
4 knowledge that the title to property has been procured from
his client by fraud, is not a good faith purchaser in immediately
procuring a conveyance to himself from his client's grantor.

Fraud: ESTOPPEL. A grantor who through fraud was induced to
5 convey her land for an inadequate price, is not estopped from
setting up the fraud against a subsequent purchaser who had
knowledge of and participated therein.

Appeal from Woodbury District Court.—HON. JOHN F.
OLIVER, Judge.

MONDAY, FEBRUARY 13, 1905.

SUIT in equity to set aside conveyances of land made
by plaintiff to defendant Christopherson, by Christopherson
to L. L. Cathcart, and by Cathcart to Carter. Carter gave a
mortgage back for part of the purchase price to defendant
Cathcart, which mortgage is held by the defendant bank.
The trial court set aside all the conveyances, protected Carter
in his purchase from Cathcart, and rendered an account
between plaintiff and defendants Christopherson and Cath-
cart. Cathcart alone appeals.—*Affirmed.*

John R. Carter, for appellant.

F. B. Robinson, for plaintiff, appellee.

W. G. Sears, for appellee Carter.

Brown & Corbett, for appellee Christopherson.

DEEMER, J.—None of the defendants save Cathcart

appeal. Prior to the transactions in controversy, plaintiff was the owner of 90 acres of land in Woodbury county, worth at least \$4,500. She was a minor when she acquired title to the property, her grandfather being her guardian. In June of the year 1897, and before attaining her majority, which was some time in November of the year 1898, she went to live in the family of the defendant Todd Christopherson, Christopherson's wife being her cousin. Here she lived for more than two years as a member of the family, receiving no compensation for her services except her support. Even before plaintiff became of age, Christopherson set about obtaining a conveyance of her Woodbury county land. Christopherson, while not her legally appointed guardian, was her confidential adviser, counselor, and friend; and for some reason he, almost immediately upon her arrival at his home, began to poison her mind against her grandfather. As a result of his machinations, he finally induced plaintiff to trade him the Woodbury county land for some property of his own in Homer, Neb., which was worth not to exceed \$600. The deal was finally consummated by an exchange of conveyances in March of the year 1899. Prior to this time defendant Cathcart, who is an attorney at law, had been employed by plaintiff, at the suggestion of Christopherson, as her counsel, and he acted as such in various matters down until the commencement of this action. Before obtaining his deed from plaintiff, Christopherson had already contracted with Cathcart to sell him the 90 acres for the sum of \$1,500. The deeds from plaintiff to Christopherson, and from Christopherson to Cathcart, were executed and filed for record on the same day. Cathcart immediately arranged a sale of forty acres of the ninety-acre tract to defendant Carter for the sum of \$1,600, receiving therefor the sum of \$800 in cash, and a note for the balance, secured by mortgage, which mortgage was deposited in the Merchants' National Bank pending an attempt to perfect the title. Practically all these transactions occur

1. FRAUDULENT
CONVEYANCES:
evidence.

red before Christopherson received his deed from plaintiff.

On account of the gross inadequacy of the consideration, the confidential relations existing between plaintiff and Christopherson, and the array of circumstances showing actual fraud practiced by him upon the plaintiff, he, Christopherson, has not seen fit to appeal from the decree rendered by the trial court against him. And it is well that he did not, for rarely has so plain a case of fraud been presented to us. His conduct was most reprehensible, and the decree as to him is clearly correct.

Cathcart is the only one who questions the decision as to Christopherson, and this he does in but a half-hearted way. He claims, however, that his purchase from Christopherson was in good faith, and that there is no evidence of the conspiracy charged against him and his grantor. He admits that he was plaintiff's attorney down until the conveyance was made, but says that he advised against the transfer to Christopherson, that his advice was not taken, and that he was thereupon discharged by plaintiff as her attorney. The record convinces us, however, that these claims are unfounded. While acting as plaintiff's attorney, he, Cathcart, concealed from his client many things which it was important for her to know. Assuming that he objected to her conveying the land, we nevertheless find him profiting from the conveyance by taking title to the land at a figure very much less than its true value, thereby becoming the recipient of Christopherson's fraud. We are satisfied that he knew of Christopherson's scheme to defraud the plaintiff, and, while he may have advised against it, he seems to have been willing to profit thereby. That fine sense of honor and integrity which should have actuated him as a member of the legal profession seems to have departed before visions of profit, and, instead of doing everything in his power to thwart Christopherson in his nefarious scheme, he was already trying to get a share of the fruits thereof. Moreover, he had contracted to sell

9. INNOCENT
PURCHASER:
fraud.

a part of the land to Carter to make himself whole, even before he had secured title to the land. He had an abstract of title made at his own expense before he knew, as he says, that the plaintiff would consummate the exchange. He did not perform his duties as attorney for plaintiff; on the contrary, he concealed many facts which it was material for her to know, notably a proposition from her grandfather of great advantage to her. There are many things in the testimony showing actual fraud on the part of Cathcart; more, that he had knowledge of Christopherson's fraud, and still more, that he took advantage of his client's ignorance for the purpose of profiting himself.

Christopherson owed plaintiff the strictest good faith and the most conscientious conduct. Instead of that, he used his relationship for the purpose of deceiving and defrauding her. Even without evidence of ac-

3. FRAUD: burden of proof.

tual fraud, the burden was upon him to show that the transaction was fair and free from deceit, and that he did not abuse his trust. *Spargur v. Hall*, 62 Iowa, 500; *Earhart v. Holmes*, 97 Iowa, 649.

Cathcart, as plaintiff's attorney, was even under a more stringent rule, for he had the obligations of an oath pressing upon him. *Byington v. Moore*, 62 Iowa, 479. His acquisition of the property practically at the same

4. INNOCENT PURCHASER: attorney and client.

time the deed to Christopherson was made is a strong circumstance, and is treated by many courts the same as a direct conveyance to the fiduciary. *McGar v. Adams*, 65 Ala. 106; *McKay v. Williams*, 67 Mich. 547 (35 N. W. Rep. 159, 11 Am. St. Rep. 597); *Cook v. Berlin*, 43 Wis. 433. Cathcart's conduct was such that it cannot be explained on any reasonable theory consistent with honesty and good faith. We shall not set forth the testimony, which to our minds clearly justifies this conclusion. It consists of many circumstances, some of them inconsequential in themselves, but all pointing to the same conclusion, and

taken as a whole, constituting indubitable proof of the alleged fraud.

But Cathcart says that plaintiff is estopped from questioning the conveyances, more particularly the one to him, for the reason that, as he says, he went to her to find out if she was satisfied with the exchange before
5. FRAUD: estoppel. parting with his money. That she then said to him that she was satisfied, and also promised to remain so. This was rather a queer transaction if he, Cathcart, purchased in good faith. We must be permitted to say that we doubt very much whether this occurred. But even if it did, there was no estoppel. Defendant Cathcart had full knowledge of the facts. Plaintiff knew little or nothing of them, was kept in the dark with reference to the exact nature of the transaction, and was told by Christopherson to keep the whole matter secret. She was relying both upon Cathcart and Christopherson as her trusted friends and advisers, and was presumably under their influence at this very time. Cathcart had already sold a part of the land for more than he was giving for the whole, so that he was safe in any event. These facts were of course all concealed from the plaintiff. The attempt to show an estoppel is but confirmation of the charge of fraud. If the transaction had been fair and honorable, no one would have thought of going to plaintiff for an approval of it before any challenge was made. If fraudulent, the statement said to have been procured from her would not be binding, for she was then presumptively laboring under the influence of both Cathcart and Christopherson. Moreover, the exact transaction was not explained to her. She was not told that Cathcart had purchased the land for \$1,500, no part of which she was to get; nor was she informed of the fact that Cathcart had already sold forty acres thereof to Carter for more than he was to pay for the whole. The facts disclosed indicate fraud and conspiracy between Cathcart and Christopherson to defraud plaintiff out of her land, and for an almost equal distribu-

tion of the spoils. Our conclusions find support in *Harper v. Perry*, 28 Iowa, 57; *Earhart v. Holmes*, 97 Iowa, 649, and other like cases.

But one conclusion can be reached from this record, and that is that the conveyances to Christopherson and Cathcart were and are fraudulent and void. Carter's rights and also those of the bank were fully protected by the decree, and they have not appealed. No complaint is made of the accounting between the parties. The motions submitted with the case are each overruled.

The decree is in all respects *affirmed*.

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| 126 | 606 |
| 137 | 507 |
| 126 | 606 |
| 140 | 48 |

MODERN STEEL STRUCTURAL COMPANY, Appellant, v. VAN BUREN COUNTY, IOWA, Appellee, and WESTERN BRIDGE COMPANY, Intervener, Appellant.

Counties: CONSTRUCTION OF BRIDGES: FRAUD: EVIDENCE. Where a
1 bridge contractor materially alters the plans and specifications for the construction of county bridges by reducing the amount of material therein, without the knowledge or consent of the county or its agents authorized to consent to the change, it amounts to a fraud for which the county may recover.

Damages: EVIDENCE. It was not error for the court, in computing
2 damages sustained by a county by reason of the failure of a contractor to use the amount of material contracted for in the construction of bridges, to follow the figures given by an expert witness who was corroborated as to the amount of shortage, rather than the estimate of an officer of the company which furnished the material based upon the factory weights of which he had no personal knowledge, and who testified simply to the approximate correctness of his estimate.

Breach of contract: DAMAGES. Where a contractor, in the con-
3 struction of county bridges, used material of less weight than provided in the contract, it was proper for the court in arriving at the measure of damages to add to the actual cost of the construction according to contract, the usual margin of profit to the contractor, as shown by the evidence.

County bridges: ESTOPPEL. No act of an engineer appointed by
4 the county to supervise the construction of bridges, nor of an

individual member of the board of supervisors by which a contractor was permitted to erect less valuable structures than provided by the contract, will estop the county from claiming damages for the default as against the contractor or any one claiming under him.

Breach of contract: ACCEPTANCE: ESTOPPEL. The acceptance of a
5 county bridge in ignorance of the fact that the same was not constructed in accordance with the contract, will not estop the county from insisting upon a breach of the contract or a recovery of damages.

Same. The execution and delivery to a bridge contractor of a
6 written acceptance of the work by individual members of the board of supervisors, made at an informal gathering for the purpose of examining the work to enable them to act intelligibly upon the matter of accepting the same, was not an act of the county; and it was not estopped thereby from relying on a breach of the contract in the construction of the bridge.

Same. The public use of a bridge will not amount to an acceptance thereof and estop the county from insisting upon a breach of the contract for its construction.

Breach of contract: ESTOPPEL. Partial payments by a county auditor on a contract on the order of a single member of the board of supervisors and without knowledge of the contractor's default in construction, will not estop the county from asserting its claim for damages based on the contractor's breach of the contract.

Estoppel: FRAUDULENT ACT OF AGENT. A county cannot be estopped
9 by the acts of its representative appointed to look after the construction of bridges, who, through collusion with the contractors, perpetrates a fraud on the county by the substitution of materials inferior to that called for by the contract.

Subcontractor's claims: LIABILITY OF COUNTY. Where a county has
10 not reserved the right to pay the claim against a contractor employed to construct bridges, and a subcontractor has failed to file the statement of his demand as provided by Code, section 3102, the county may rightfully pay the contractor according to the terms of the contract, without inquiring as to materials furnished by subcontractors.

Same. A subcontractor who furnishes material for the construction of county bridges under an agreement with the principal contractor alone, is charged with notice of the terms and conditions of the principal contract, and his rights are limited thereby; and where the county has lawfully discharged its obligation to the contractor prior to notice of the subcon-

tractor's claim, or where the contract is void for fraud, the subcontractor has no recourse against the county.

Subcontractor's claims: DAMAGES: SET-OFF. Where a county contracted separately for the construction of two bridges and was sued by a subcontractor who furnished material for both under a single agreement with the contractor and who made but a single statement for the materials furnished and was seeking to force his entire claim against the county for an alleged unpaid balance for either or both bridges, the county could offset its entire damages for a breach of both contracts in determining whether there was anything in its hands applicable to the subcontractor's demand.

Interrogatories: FAILURE TO ANSWER: JUDGMENT. Code, section 3610, does not contemplate a summary entry of judgment because of indefinite or unsatisfactory answers by a municipal corporation to interrogatories attached to a pleading; and such an order will not generally be entered without an opportunity to the delinquent party to correct the fault.

Appeal from Van Buren District Court.—HON. ROBERT SLOANE, Judge.

MONDAY, FEBRUARY 13, 1905.

THE opinion states the case.—*Affirmed.*

Wherry & Walker and Ryan, Merton & Newberry, for appellant Modern Steel Structural Co.

Mitchell, Sloan & McBeth and Pennington & Pennington, for appellant intervener.

J. C. Davis, E. R. Harlan, and E. L. McCoid, for appellee.

WEAVER, J.—On June 20, 1900, the defendant county entered into two separate written contracts with the Western Bridge Company, by the terms of which the latter agreed to furnish the materials and erect for the former two bridges across the Des Moines river, as follows: One at the town of Selma for \$12,050, and one at the town of Kilbourne for

\$15,200. In each case it was provided that seventy-five per cent. of the cost of the materials should be paid for on their delivery and acceptance, and the remainder upon the completion and acceptance of the work. The Western Bridge Company, which was not a manufacturer of or dealer in bridge materials, entered into a contract with plaintiff for the purchase of such materials as were necessary, such materials to be prepared by the plaintiff ready to go into the bridges according to the plans or directions furnished by the bridge company. This contract was entire, covering the materials for both bridges, and providing for payment at a given rate per hundred pounds, seventy-five per cent. on receipt of materials at their destination and the remainder within thirty days of receipt of last shipment. Under this contract materials were furnished to the bridge company, and two bridges were erected in alleged compliance with the contract. This action was begun by the plaintiff against the county on June 20, 1901, under Code, section 3102.

The petition alleges the letting of the bridge contracts by the county to the bridge company, and the contract of the latter with the plaintiff, pursuant to which it furnished materials to the bridge company, on which there was an unpaid remainder of \$6,099, with interest. It is further alleged that within thirty days after the last of said materials was furnished plaintiff filed a duly verified statement of its account with the auditor of said county, which account and claim is still unpaid, and that under the terms of the contract between the bridge company and county the latter was required to withhold all of the contract price except seventy-five per cent. of the cost of the materials for the purpose of meeting such claims as the one now made by the plaintiff. Plaintiff therefore asks to recover from the county the full unpaid balance of its account against the bridge company. For answer to this claim the county admits letting the bridge contract to the Western Bridge Company, but denies that said bridges ever were erected according to

said agreements. It alleges that the bridge company fraudulently substituted and placed in each of said bridges other lighter and less valuable materials than were called for by said contracts; that by reason of said fraud and failure to perform said contracts the defendant has sustained damage greatly in excess of the unpaid remainder of the contract price, and there is nothing in the hands of the defendant applicable to the payment of the plaintiff's claim. In reply the plaintiff alleges that the county was represented by one Booth, an engineer, in supervising the construction of the bridge; that Booth inspected and approved the materials as delivered; and that since the bridges were built the county, with full knowledge of all the facts, has accepted and opened said bridges to public use, and is now estopped to deny its liability to pay therefor.

On December 11, 1901, the Western Bridge Company intervened, setting up its contracts with the county to build the bridges and with plaintiff to furnish the materials therefor, and alleges that such materials were substantially of the character and weight called for by the contracts with the county. It also pleads the inspection and approval of the materials and of the bridges by the agents and representatives of the county, and asks judgment for the unpaid balance of the contract price. As against the plaintiff it sets up various claims for damages on account of delays and expenses occasioned by the fault of plaintiff in the completion of the work. Taking issue upon the petition of intervention, the plaintiff denies the bridge company's claims for damages, and demands judgment against it for the unpaid balance of the account for bridge materials. The county answering said petition, sets up in detail the aforesaid charge of fraud in the construction of the bridges and in the failure of the intervener to perform its contract, and denies the authority of Booth or any other person to consent to any material departure from the agreement.

The issues were tried to the court as in equity. The

decree finds the Western Bridge Company failed to perform its contract, and that the county was entitled to damages from said company in the sum of \$1,046.42 in excess of the unpaid remainder of the contract price for the construction of the bridges, and rendered judgment accordingly. It also finds the plaintiff entitled to recover from the bridge company the sum of \$6,815.67, being the unpaid remainder of the account for materials furnished; and as against the county the petition was dismissed. The plaintiff and the intervener have both appealed, but the appeal on the part of the intervener has not been argued.

I. Turning first to the fact questions involved, we find ourselves in accord with the conclusions of the trial court as expressed in its written opinion which accompanies the decree. Without attempting to set out in full the various circumstances disclosed by the voluminous record, we may say it is shown

1. CONSTRUCTION
OF BRIDGES:
fraud; evi-
dence.

beyond a reasonable doubt that the bridge contractor willfully and designedly ignored the specifications upon which it bid for and obtained the contracts from the county, and prepared other specifications for materials of greatly inferior weight and strength. It was upon these substituted specifications, made without the authority or consent of the county, that the contract between the plaintiff and the bridge company was entered into, and pursuant to which plaintiff furnished the materials. By this scheme the Selma bridge, which should have contained 230,000 pounds in the superstructure and 108,000 pounds in the substructure, was reduced to 183,560 pounds in the first item and 69,630 pounds in the last item. In respect to the Kilbourne bridge the shortage was a little less flagrant, but even there it amounted to 18,180 pounds in the superstructure and 31,002 pounds in the substructure; making the total weight of metal in the bridges as constructed 133,992 pounds less than it should have been had the company's contract been faithfully and honestly performed.

It would be farcical to hold that this was in any sense of the word a substantial compliance with the contracts, or to account for the discrepancy on the theory of mere accident or mistake. Indeed, it is scarcely denied by the bridge company that the specifications on which the contracts were let were by it systematically scaled down in size and weight of materials, but it is sought to excuse or justify this action on the claim that the board of supervisors or the engineer employed by the board to look after the interests of the county consented to the change. The proof entirely fails to establish any consent or agreement by the board of supervisors for this radical variation from the terms of the contract, and it is very certain that the engineer had no power or authority to bind the county to any such change. It is equally clear that the engineer did know that the bridges were not being built according to the agreement, and his acquiescence therein can be accounted for on no other theory than corrupt connivance in the wrong being perpetrated. There is room also to believe that the individual member of the board in whose district or territory the bridges were located knew, while the bridges were still in the course of construction, that they did not come up to contract requirements, but his lack of technical knowledge of such work may account for his apparent disregard of the public interests committed to his care. Indeed, plaintiff's counsel frankly accepts the alternative, saying that if no change was made in the contract by the consent of the board of supervisors, or of the duly authorized engineer, "then it cannot be denied that the engineer was in collusion with the Western Bridge Company to defraud this county; neither can it be denied that the board of supervisors were shamefully remiss in their duties in permitting this material to go into the construction of the bridges." This statement must be concurred in by every candid reader of the record here presented, and, the alleged change or modification in the contract not having been shown, and the failure of the bridge company to con-

struct the bridges according to agreement having been fully established, we have next to inquire concerning the rights and remedies of the several parties under the issues made by their pleadings.

II. Objection is made to the method adopted by the trial court for the computation of damages which the county is entitled to recover from the Western Bridge Company.

It is said that the court adopted as its estimate
2. DAMAGES:
evidence.

of the deficiency in the weight of the bridges the figures given by a single expert witness — one Ditman — and ignored the estimates given by other witnesses. It is true that the computations made by the trial court correspond closely, if not entirely, with those made by Ditman; but an examination of the record shows that the opinion of this witness was corroborated in many ways, and we think it may safely be accepted as a conservative and fair estimate. The president of the steel company, Mr. Harding, states the weights of the material to have been somewhat greater than Ditman's estimate, and it is urged that, as he testifies to actual weights, as opposed to an expert's opinion, his figures should control. It is not quite correct to say that Mr. Harding testifies to actual weights. Attached to plaintiff's petition is a bill of items which purports to give the net weight of each shipment, and this he says is correct, or substantially so. He elsewhere says: "In making my estimates of the cost of those bridges, I took our scale of weights for the amount of metal in the bridges. The estimate I gave you may not foot up to the total amount exact, but it will be approximately correct." He nowhere says that he personally weighed or supervised the weighing of the metal, or that he gives such weights from actual personal knowledge.

On the theory that the bridges, as constructed, were of such character and strength as to be available for public use, though not made according to contract, the trial court adopted as the measure of the county's damages the value of

the metal which represents the difference between the weight of the bridges if constructed according to contract and their weight as actually constructed. On this basis the court states its finding as follows:

The value of the difference in the steel of the Selma bridge would be as follows:

| | |
|--|------------|
| Deficiency in superstructure, 46,440 lb., at 3.3 cents | \$1,532 52 |
| Deficiency in substructure, 38,370 lb., at 3 cents. | 1,151 10 |
| <hr/> | |
| Total | \$2,683 62 |
| Add 15 per cent..... | 402 50 |
| <hr/> | |
| Total | \$3,096 16 |
| In the Kilbourne bridge, the difference in the superstructure is 18,180 lb., worth 3.3 cents per pound, making | |
| Substructure, 31,002 lb., at 3..... | \$ 599 94 |
| | 930 06 |
| <hr/> | |
| Total | \$1,530 00 |
| Add 15 per cent. profit..... | 229 50 |
| <hr/> | |
| Total | \$1,759 50 |

Against the aggregate of these damages, \$4,855.66, the court set off the unpaid remainder of the contract price of the bridges, \$3,905.60, leaving a balance due the county from the bridge company of \$950.06, for which sum, with interest, judgment was accordingly entered. In explanation of the court's estimate above quoted it should be said the testimony tends to show that in the construction of bridges a fair margin of profit to the contractor is at least fifteen per cent. upon the cost of materials in place in the complete structure. It is the contention of the appellant that this

allowance of the margin of profit is erroneous, and should have been deducted from, instead of added to, the value of the material required to make the bridge according to contract. We do not understand on what theory it is claimed that fifteen per cent. should have been deducted from the cost of the metal in the completed bridge, for such cost includes only purchase price, with freight and expense of construction added, without any margin to the contractor. Such being the case, it would seem a fair proposition that in estimating the value of a bridge of the full weight contracted for there should be added to the bare cost of construction such reasonable margin of profit as the county would ordinarily be required to pay in letting a contract for such work.

III. Appellant argues that, even conceding the failure of the bridge company to construct the bridges according to contract, the county is estopped by the acts of the board of supervisors and Engineer Booth from any recovery of damages; or, if entitled to recover damages from the bridge company, it is estopped from setting up such damages as against the plaintiff's claim. We regard it as elementary that the county cannot be estopped by the fraudulent or unlawful acts of its officers or agents, and this is assuredly true where the fraud or wrong involves a betrayal of the very interest which they are elected or appointed to protect. *Gill v. Appanoose County*, 68 Iowa, 21; *McGillivray v. Township*, 96 Iowa, 633; *Bank v. Township*, 86 Iowa, 339. It follows that any act of the engineer or any individual member of the board of supervisors by which it was sought or intended to permit the bridge company to erect bridges materially inferior or less valuable than were contracted for, and yet draw from the county the full contract price, will not operate to create an estoppel against the county in favor of the delinquent contractor, or any other person claiming by, through or under him.

But it is also contended that, after the bridges were

4. COUNTY
BRIDGES:
estoppel.

completed, the board of supervisors accepted them as being a sufficient compliance with the contracts, and the claim for damages cannot now be insisted upon as a defense against this claim presented by the plaintiff. The facts on which this claim of acceptance or ratification is grounded are as follows: On January 24, 1901, the three members of the defendant's board of supervisors met at the Selma bridge and made a test of the strength of the bridge with several wagon loads of sand. Two of the members united in giving a writing to the bridge company as follows: "We, the supervisors of Van Buren county, having tested the Selma bridge and found it in accordance with contract, hereby accept the same as the property of Van Buren county. Will Hastings. W. E. Baldwin." The third supervisor, being convinced, as he now says, that the bridge was not in accordance with the contract, and not wishing to assume any responsibility for its acceptance, went away, and took no part in the proceeding. Some days later the supervisors met at the Kilbourne bridge, to which a test of the kind above mentioned was applied, and there seems to have been an expression of opinion by at least two of the members that the bridge was satisfactory, but by this time the deficiency in the weight of the metal had become the subject of more or less public discussion, and it was determined to postpone action upon the matter of acceptance of the work. Both bridges were, however, thrown open or left open to public use, and the supervisors provided for the construction or completion of the approaches. Unless these meetings of the supervisors to inspect the bridges are to be construed as sessions of the board, and the giving of the writing aforesaid as the act of the board, and not of the individual members signing it, there was never a formal acceptance of either bridge. But an acceptance or ratification induced or obtained by fraud or deceit, or given in ignorance that the thing accepted is not in accordance with the contract under which it is furnished, will not estop the

5. BREACH OF
CONTRACT:
acceptance;
estoppel.

acceptor from alleging the breach of contract, or from a recovery of damages therefor. *Carthan v. Lang*, 69 Iowa, 384.

In our judgment, however, the signing and delivering of the paper to the bridge company by two of the supervisors cannot be said to have been the act of the board, nor binding upon the county as an acceptance of the

6. SAME. Selma bridge. The meeting seems to have been an informal gathering for the purpose of examining the work, and enabling them at the proper time to act intelligently upon the matters of its acceptance; but, so far as appears, the meeting was not called to order, or organized for official business, no resolution was offered or voted upon, no clerk was present to preserve a record of the proceedings; nor was this informal action, so far as appears from the record, ever reported to or approved by the board in session. That the act of the individual members of a public body, even though concurred in by a majority of its members, is not official or binding upon the municipality which they represent, is too well settled for doubt or debate. *Young v. Black Hawk County*, 66 Iowa, 465; *Rice v. Plymouth County*, 43 Iowa, 136; *Ind. Dist. v. Wirtner*, 85 Iowa, 387.

It may be admitted that an acceptance can be found or inferred from the conduct of the parties, and there may also be circumstances under which the party receiving and

7. SAME. enjoying the benefit of a contract will be estopped to deny acceptance, but we find nothing of that nature in the case before us. The bridges are of a ponderous and presumably permanent character. Like a courthouse, or business block, or dwelling, they cannot be discarded nor readily removed. They are attached to the soil, are a part of the public highway, and their use by the public is not a waiver of the right to insist upon the breach of the contract. *Carthan v. Lang*, *supra*; *Mallory v. Montgomery County*, 48 Iowa, 681.

Nor do the payments which have been made to the bridge company estop the county to assert its claim of damages. This must be so for two sufficient reasons. In the

8. BREACH OF
CONTRACT:
estoppel.

first place, the payments are not shown to have been made with knowledge of the default of the bridge company. Two of the three supervisors constituting the board in 1901, together with the former member who retired December 31, 1900, unite in testifying explicitly that they never knew of or consented to any change in the terms of the contract, and did not know of this change in the character and weight of the materials until after the time of this alleged acceptance. It is also shown without dispute that the payments to the bridge company were made without any presentation to or allowance of the claim by the board, and without any order of the board for the issuance of the proper warrants. In the loose and unbusinesslike methods which seem to have prevailed in the conduct of the county's affairs, there appears to have been some sort of general understanding between the members of the board that whenever claims or demands were presented on account of work done or expense incurred, bearing the indorsement or approval of the individual member in whose part of the county the transaction in question occurred, the auditor should issue a warrant for its payment. The list of claims thus paid in vacation upon the approval of a single individual member would be taken up at the next session of the board, and a perfunctory order of "allowance" entered of record. It was in this manner that the payments to the bridge company were made — acts so clearly in violation of law that no rights can be predicated thereon by way of an estoppel against the county. We do not wish to be understood as asserting that the supervisors or auditor acted corruptly in respect to these payments, but the practice of which this is an illustration is so essentially bad that no amount of good faith or upright intention can justify or excuse it. The board is elected to act as a body —

a unit — and not as irresponsible individuals; and the county is entitled to have the candid investigation and united action of the entire board, or at least of a quorum of its members, upon every dollar of expenditure upon which it is called to pass.

We find nothing upon which the estoppel asserted by the plaintiff can be upheld. Conceding the knowledge and consent of Booth to the substitution of the lighter material,

9. ESTOPPEL:
fraudulent
act of agent.

it was clearly a fraud upon the county, and of itself is of no force or effect to deprive the county of its right to insist upon a full and substantial performance by the bridge company. If this fraud was not known to the board of supervisors, then of a certainty neither the contractor who inspired the betrayal of trust, nor the plaintiff who claims through that contractor can thereby deprive the county of its right to the benefit of its contract. On the other hand, if the supervisors knew or consented to the substitution of bridges having a deficiency of more than sixty-five tons of metal to be paid for at full contract price, then they too became parties to the fraud, and the county is not bound thereby to the contractor or to the plaintiff, whose rights, generally speaking, are to be measured by those of the party to whom it furnished the materials. It is said by counsel that if the supervisors lacked the skill or experience to enable them to pass intelligently upon the work or materials in the bridges it was their duty to appoint some competent person for that purpose, and that his acts in the premises will bind the county. For the purpose of this case the proposition stated may be accepted as correct, with this vital qualification: that the county can in no event be bound or estopped by the collusion of the person thus appointed with the contractor to perpetrate a fraud upon the county which he represents.

IV. It is not to be overlooked that plaintiff has no contractual relations with the defendant county. It sold the bridge materials, not to the county, but to the Western

Bridge Company. It has no right to recover from the county, except as it may succeed in establishing a claim under the provisions of the statute. The county did not, by its contracts with the bridge company, reserve the right to discharge the claims of subcontractors. The statute (Code, section 3102) is intended to provide for one who furnishes labor or materials to a contractor upon a public work a remedy having some analogy to a mechanic's lien. But it does not create any lien. It provides that by taking the proper steps within due time, the claimant may, in effect, be substituted for the contractor, and recover from the municipal corporation to the extent of his just demand, if there be found in the hands of the corporation any moneys due to such contractor. The law is carefully framed to protect the municipality from onerous burdens and undue annoyance in litigation of this kind, and specifically provides that the claim of a subcontractor shall not be enforced against a municipal corporation "in excess of the contract price to be paid for such building, bridge, or improvement, nor shall such corporation be required to pay any such claim before, or in any different manner from, that provided in the principal contract." No statement of the plaintiff's claim in this case was filed with the county auditor, and no notice thereof served upon the county, until February 6, 1901, since which no payments of any kind have been made to the bridge company. When the plaintiff's statement was filed and notice served, the bridge company had already been paid all and more than it was entitled to receive for the bridges constructed. This being found, we are brought to the question whether the county has in any respect so violated its statutory obligations to the bridge company's subcontractors that, although it owes such company nothing, it should still be compelled to pay the plaintiff's claim. Not having reserved the right to pay the claims of such contractors, and no statement being filed or notice served as provided by statute, the county could rightfully

10. SUBCON-
TRACTOR'S
CLAIMS: lia-
bility of
county.

pay the contractor according to the terms of the contract, without any inquiry whether he had paid plaintiff for the materials used in the bridges. This we have frequently held. *Epeneter v. Montgomery County*, 98 Iowa, 159, and cases there cited.

The subcontractor who intends to assert a claim under this statute must take notice of the terms and conditions of the principal contract, for it is through this contract his rights, if any, are to be traced. Now, the
11. SAME. contracts with the county provided that the bridges should be constructed of materials of a given kind, size, and weight. The contractor wrongfully substituted materials of substantially less size, weight, and value. The materials thus made use of to defraud the county were furnished to the contractor by the plaintiff. It may be conceded that the plaintiff was not a party to the conspiracy for the perpetration of this fraud, but it saw fit to sell the materials to the bridge company, and unless those materials were something called for by the terms of the principal contract, and therefore something for which the county must have understood its contractor might become indebted to others, the sale must be held to have been made on the credit of the bridge company alone, and no right can be asserted thereunder against the county. There is no hardship in saying to the subcontractor that, if he is not content to sell his materials upon the credit of the principal contractor, and wishes to secure the benefit of the statute, he must look to it that the materials are such as fairly contemplated by the terms of the principal contract. For illustration, where a city lets a contract for paving its streets with vitrified brick of a given standard or quality, a subcontractor may furnish such brick, and, by taking the proper and timely steps, may establish his claim against the municipality; but if the principal contractor fraudulently substitutes soft, inferior, and distinctly less valuable brick, such as upon no reasonable or fair interpretation can be said to come within the con-

templation of the contract, a very different question is presented. To say that under such circumstances the subcontractor, who furnished the inferior materials with which the fraud was accomplished, though without any wrongful purpose on his part, may establish a claim against the city, and thus compel the city to pay the full contract price, where the principal contractor himself could recover nothing, would be a most inequitable proposition, and we cannot hold that the Legislature intended to create such an anomalous and oppressive right of action. Such an interpretation of the statute would make every municipal corporation the helpless victim of fraudulent combination in the letting of every contract for public improvements.

By reason of its fraud and failure to perform, the bridge company could maintain no action and recover no compensation on the contracts made with the county. The utmost limit of its right to recover in any form of action would be the contract price, reduced by the damages which the breach of its contract had occasioned to the county. If, on account of the fraud or failure of the bridge company, the contract is without legal vitality in the company's hands, it cannot be imbued with life for the benefit of the subcontractor. The stream cannot rise higher than its source. The payments made to the bridge company may have been improvident in the failure of the supervisors to withhold a sufficient margin to cover all possible damages to the county, but they were not made in wrong of the plaintiff. If we should adopt plaintiff's theory that the Selma bridge was completed and accepted on January 24, 1901, then, if the contract is to be considered, the entire consideration for that bridge became at once due and payable, and plaintiff, having filed no statement of its claim, cannot complain that such payment was in fact made. Treating the price of the Selma bridge as having been fully paid, there remained payments for which the county was entitled to credit upon the Kilbourne bridge, amounting to \$11,294.46. This sum in-

cludes an item of \$979, being the remainder of a larger sum which it is conceded was improperly obtained from the county by the bridge company, without authority from the board of supervisors, and was in part refunded. The payments made and applicable to this bridge amount to substantially seventy-five per cent. of the contract price, and this, it will be remembered, is the limit of the payment which the bridge company could demand until the completion of the work. This limit had been reached before plaintiff's statement of account was filed.

It seems, therefore, that from the standpoint of either party to the controversy, the final inquiry is whether the county can be required to forego its claim for damages, and pay this money over to the plaintiff. For the reasons already stated, this cannot be done.

12. SUBCON-
TRACTOR'S
CLAIMS: dam-
ages; set-off.

The principal, if not the only, reason for withholding any part of the price for the completion of the work was to protect the county against the consequences of the contractor's wrong or default, and that protection should not be destroyed for the benefit of a third party, unless it be for some failure of duty which the county owed to such party — a circumstance which is not shown to exist. The suggestion of counsel that, in any event, the right to set off damage applies to such only as were occasioned by failure to properly construct the Kilbourne bridge, and that claims for damage on account of the Selma bridge must be prosecuted by independent proceedings against the bridge company. It has been the appellant's contention at all times that, while the undertaking to build the bridges was contained in separate contracts, they were in fact a single transaction, and must be so treated. There was but a single contract between the plaintiff and the bridge company. But a single statement of account, comprising all the materials for both bridges, was filed with the auditor. Plaintiff is here seeking to enforce its claim under that statement for the price of all the materials for both bridges, as against the alleged

unpaid balance of the contract price for either or both; and we can conceive no good reason why the county may not insist upon its entire damages being considered in determining whether there be anything in its hands applicable to the plaintiff's demand.

V. Plaintiff attached certain interrogatories to its reply, to be answered by the county. On the claim that some of the questions had not been fully and explicitly answered, plaintiff moved to strike the responses thereto, and for judgment, because of such failure, as provided in Code, section 3610. The overruling of this motion is assigned as error. The ruling was correct. The statute does not, in our opinion, contemplate the summary entering of judgment because of an indefinite or unsatisfactory answer to such interrogatories, and such order could not, in general, be properly made without giving the delinquent party an opportunity to correct the fault complained of. Moreover, the party called upon to answer in this case was a municipal corporation. It could not be made a witness, and, if it was subject to an order for compulsory answers to interrogatories attached to a pleading, it could answer only by its officers or agents. These persons may or may not be able to respond from personal knowledge, and, if their answers are in some respects indefinite or incomplete, it does not follow that the persons making them are perverse or uncandid, or that the municipality should, upon that account, be deprived of a hearing upon the merits of its case.

What we have already said makes it unnecessary to discuss other questions argued by counsel. The decree of the district court appears to effect justice between the parties as nearly as such result is possible under the complication of circumstances, and it is *affirmed*.

13. INTERROGA-
TORIES: fail-
ure to
answer; judg-
ment.

WALTER SCHLENSIG V. MONONA COUNTY, Appellant.

Counties: DEFECTIVE BRIDGES: INSPECTION AND REPAIR. Where a county, after notice of its unsafe condition, in undertaking to repair a bridge and put it in condition for public travel fails to use reasonable care in the work, it is negligent; and an inspection of the same after its repair by agents of the county who report it safe for ordinary travel, will not relieve the county from liability for the consequences of such negligence.

Appeal from Plymouth District Court.—HON. F. R. GAY-
NOR, Judge.

TUESDAY, FEBRUARY 14, 1905.

SUIT to recover damages for injuries occasioned by the collapse of a defective bridge. There was a trial to a jury, and a verdict and judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

W. L. Smith, for appellant.

T. E. Brady and McDuffie & Keenan, for appellee.

SHERWIN, C. J.—The bridge in question was built by the defendant in 1896. In 1900 it was injured and weakened by fire, but was soon thereafter repaired by the defendant, and left open for public use. The petition alleges negligence in the original construction of the bridge, and negligence in failing to properly repair the same. After the fire the board of supervisors was duly notified of the unsafe condition of the bridge, and in response thereto the member whose duty it was to look after the bridges in that part of the county visited it with the foreman of the county bridge crew, and they inspected it, and decided on the re-

pairs necessary to put it in safe condition for public use. Soon after this inspection the repairs decided on were made under the supervision of this foreman, and on the trial the appellant offered to prove that he and the supervisor who had inspected the bridge with him thought that the bridge, when repaired, was reasonably safe for ordinary travel. This testimony was rejected, and the appellant argues that the ruling was erroneous, under the holding in *Ferguson v. Davis County*, 57 Iowa, 601. That case does not, however, sustain the contention. There one of the questions was whether the county had been negligent in not inspecting the bridge after notice that it had become unsafe, although two years and a half before that time a competent bridgeman had advised the county that it would probably be safe for a longer period. The county complained of an instruction that told the jury that if the bridge had been inspected by a competent man, and had been reported safe, the county would not be negligent for a failure to again inspect it within that time, unless it had been notified that it was in a dangerous condition. The instruction was held not erroneous as applied to the facts of that case. It is manifest that, whether erroneous or not as an abstract proposition of law, the instruction was so favorable to the county that it could not complain thereof. Considering the instructions in the Davis Case as a whole, we do not think it true that a rule is there announced which relieves a county of liability, as a matter of law, where it has had an inspection made by a competent man. The most that can be claimed for the decision is that such inspection may prove that the county has in fact exercised reasonable care in the matter. But whatever the rule there stated, the case is not controlling here, on account of the marked difference in the facts. Here the county, through its agents, undertook to repair and put in safe condition for public use a bridge that was known to be unsafe; and if, in so doing, it failed to exercise the measure of care required by the law, it was negligent, and ought to respond therefor. *Huff v.*

Poweshiek County, 60 Iowa, 529; *Cooper v. Mills County*, 69 Iowa, 350; *Ferguson v. Davis County*, *supra*.

The questions of the defendant's negligence and of the plaintiff's freedom from negligence were clearly for the jury, and its finding thereon cannot be disturbed. There was also evidence tending to show that the county should have anticipated the use of this bridge for the passage of traction engines. They had been in general use in the county for several years before the bridge in question was built, and had for some time prior thereto been used in its immediate vicinity, and there was nothing in its location or in the topography of the country around it making such use unusual or unreasonable. *Yordy v. Marshall County*, 80 Iowa, 405, and 86 Iowa, 340.

Several of the instructions are criticised because of particular language used therein, evidently through oversight. That there was an unfortunate use of words in some, and an unfortunate lack of words in another, is quite apparent; but taken together, they gave the jury a correct statement of the law governing the case, and could not, we think, have been misleading in any respect. Jurors of average intelligence would have no difficulty in understanding the meaning of the court, although it was not as clearly expressed as it might have been. The instructions asked by the appellant were properly refused, for the reasons already given.

We find no error for which the case should be reversed, and the judgment is therefore *affirmed*.

J. J. SMYTH, Appellant, v. CATHARINE HALL and O. R. HALL.

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| 126 | 627 |
| 130 | 285 |
| 125 | 627 |
| 138 | 340 |

Fraudulent conveyances: EXEMPTIONS: PROPERTY ACQUIRED WITH
 1 PENSION MONEY. Land purchased with pension money is exempt from execution, although a portion of the price may have been paid from the proceeds of a sale of coal rights therein, as the

same constitute an interest in the land and are not the increase or produce derived from the land; and the property may be conveyed free from liability for grantor's debts.

Fraud: BURDEN OF PROOF. The burden of proving the intent of a son, in receiving a conveyance from his mother, to assist in defrauding her creditors, is on the creditors attacking the conveyance.

Appeal from Lucas District Court.—HON. ROBERT SLOAN,
Judge.

TUESDAY, FEBRUARY 14, 1905.

ACTION to set aside a conveyance of real property by defendant Catharine Hall to her codefendant, O. R. Hall, on the ground that it was made with intent to delay, hinder, and defraud creditors. There was a decree in favor of defendant O. R. Hall, and plaintiff appeals.—*Affirmed.*

S. C. Hickman and *J. A. Campbell*, for appellant.

W. B. Barger, *J. A. Penich* and *E. A. Anderson*, for appellees.

MCCLAINE, J.—The facts conceded by the appellant are that defendant Catharine Hall, who was drawing a pension from the federal government as a soldier's widow, in 1897 entered into a contract for the purchase of one hundred and sixty acres of land from one Brown for the agreed price of \$2,400, and paid \$216 of that amount out of her pension money. Afterwards she sold the coal rights under eighty acres of the land for cash, and used \$1,050 of the proceeds in making a further payment, and then received a deed for the premises, subject to a purchase-money mortgage for \$1,380. Of the one hundred and sixty-acre tract, forty acres became her homestead, on which she resided with her children; and in January, 1902, she conveyed the remaining one hundred and twenty acres to defendant O. R. Hall, one

of her sons, in consideration of the cancellation of her note to the son for \$300, the payment of \$720 in cash, and the assumption of the purchase-money mortgage on the entire tract. The contention of appellant is that this conveyance was in fraud of creditors, and he seeks to have it set aside, and the land subjected to the payment of judgments held by him against Catharine Hall. Counsel for appellant argue two grounds on which the decree of the lower court in favor of defendant O. R. Hall might have been predicated: First, that the land was exempt, as procured by pension money, under the provisions of Code, section 4009; second, that the evidence does not show that O. R. Hall accepted the conveyance to assist his mother in putting her property out of the reach of her creditors; and they question the correctness of the decree of the trial court, as predicated on either of these two grounds.

I. Prior to the enactment of chapter 23 of the acts of the Twentieth General Assembly, section 1 of which is substantially embodied in section 4009 of the Code, it was held in this State by a divided court, and confessedly against the weight of authority in other States, that the exemption of pension money provided for in the federal statutes (Rev. St., section 4747 [U. S. Comp. St. p. 3279]) operated to exempt also property purchased with pension money. *Crow v. Brown*, 81 Iowa, 344; *Crow v. Brown*, 86 Iowa, 741. By the subsequent enactment of the provision above referred to, this rule is now statutory, and it has been held that it operates to exempt property for which that acquired by pension money is exchanged, no other funds being invested in the acquisition of the new property. *Smith v. Hill*, 83 Iowa, 684. But it does not operate to exempt the increase or produce derived from the property which is exempt as procured with pension money. *Diamond v. Palmer*, 79 Iowa, 578; *Haefer v. Mullison*, 90 Iowa, 372. And see *Marquardt v. Mason*, 87 Iowa, 136; *Cook v. Allee*, 119 Iowa, 226; *Manning v. Spry*,

1. EXEMPTIONS:
property ac-
quired with
pension
money.

121 Iowa, 191. In this case Catharine Hall's original interest in the land was acquired exclusively by the investment of pension money. The only subsequent payment made by her on the land was with proceeds of a sale of part thereof; that is, the right to take coal therefrom. This was an interest in the land, and not personal property resulting from the use of the land. We suppose it would not be questioned that if Catharine Hall had been able to sell a portion of the land at an increased price, and the proceeds had been sufficient to pay off the remainder of the purchase money, she would have held the remaining portion of the land exempt as acquired by pension money. And this case is analogous to that; the portion of the land sold being an interest therein consisting of coal rights, instead of a specified number of acres in fee. We reach the conclusion, therefore, on this branch of the case, that the entire interest which Catharine Hall had in the one hundred and sixty-acre tract purchased from Brown (that is, the entire ownership of the tract, subject to the purchase-money mortgage) was exempt, as acquired by pension money, and might be conveyed by her free from liability for her debts. *Marquardt v. Mason*, 87 Iowa, 136.

II. But a consideration of the evidence relied upon as tending to show fraud on the part of O. R. Hall in accepting a conveyance of the one hundred and twenty-acre tract from his mother leads to the same result. As already stated, it is established beyond reasonable controversy that O. R. Hall paid his mother \$720 in cash, and surrendered a note which he held against her for \$300, assuming the purchase-money mortgage. And it is equally well established that this was the reasonable value of the land at the time he purchased it. Counsel for appellant marshal the circumstances disclosed by the testimony of the witnesses, as tending to show that the cash payment was by money not actually belonging to O. R. Hall, but in reality the proceeds of property belonging to Catharine Hall and her other sons, who were indebted with

her to the plaintiff. But we think that the evidence preponderates in support of the contention for appellees that this money belonged to O. R. Hall in his own right, as the proceeds of live stock acquired by him with his own earnings. It will be impossible to set out the evidence relating to the various transactions for the purpose of supporting this conclusion, but it is reached after a careful examination of the entire record.

The validity of the note for \$300 which O. R. Hall surrendered to his mother as a part of the consideration for the purchase is also questioned; but we have no
2. FRAUD: burden of proof. difficulty in reaching the conclusion that this note was valid, representing an indebtedness for services rendered in improving the farm while it belonged to Catharine Hall.

The burden of proving a fraudulent purpose on the part of O. R. Hall in accepting this conveyance, to assist his mother in defrauding plaintiff and other creditors, was, of course, on the plaintiff. Counsel urge that the evidence, taken together, shows a fraudulent scheme from the beginning, by which the brothers of O. R. Hall induced their mother to sign notes, which were negotiated for cash, and the proceeds used in various ways until she became practically bankrupt, with the purpose that this son, who did not become liable for such indebtedness, should ultimately acquire the property in his own name, and thus work a fraud upon creditors. But mere suspicion of fraud is not enough to require the setting aside of a conveyance made for an adequate consideration, and the evidence on which plaintiff relies can hardly be said to raise more than a mere suspicion. The transactions referred to by counsel are reasonably explained by the testimony as consistent with the entire good faith of O. R. Hall, and we reach the conclusion that no fraudulent purpose on his part was established.

The decree of the lower court is therefore *affirmed*.

A. H. REUPKE v. D. H. STUHR & SON GRAIN COMPANY,
Appellant.

Master and servant: EMPLOYMENT OF HELP: AUTHORITY OF AGENT.

- 1 Where the authority of the manager of a grain business to employ help is not expressly limited and there is a proven custom to employ solicitors for a year or longer, it will be presumed in the absence of a contrary showing that the authority was conferred in conformity with the custom; and an employé given a contract for a year will be protected when entered into in good faith and with reasonable prudence.

Evidence: CUSTOM. The testimony of a witness on the question
2 of a custom, that he had read of the same, was not prejudicial where the existence of the custom was not disputed.

Instructions: ERRONEOUS USE OF WORDS. The erroneous use of the
3 word "defendant" for "plaintiff" in an instruction was not prejudicial, where, from the instructions as a whole or the paragraph in which the error occurred, the jury could not have been misled.

Instructions: INCONSISTENT CLAIMS. The statement of a servant
4 made out of court should be wholly inconsistent with his claim for compensation for the balance of his term after a claimed wrongful discharge, to require an instruction on the question of his having voluntarily left the employment.

Appeal from Scott District Court.—HON. J. W. BOLLINGER,
Judge.

TUESDAY, FEBRUARY 14, 1905.

SUIT to recover compensation for personal services.
Trial to a jury, and verdict and judgment for the plaintiff.
The defendant appeals.—*Affirmed.*

Lane & Waterman, for appellant.

Cook & Dodge, for appellee.

SHERWIN, C. J.—The defendant was a corporation,

whose business was managed by D. H. Stuhr. Stuhr was given authority to employ the help necessary to properly conduct the business, and contracted for the plaintiff's services as a grain solicitor for the term of one year from the 15th day of August, 1902. The defendant discharged him before the expiration of this time, and this suit was brought to recover the contract price for his services for the months of May and June. Stuhr was not employed for a fixed period, and the appellant contends that he had no power to contract with the plaintiff for one year. The rule is that a manager of a corporation cannot engage employes for a long future period without express authority. There was no express limitation of Stuhr's authority to employ for a definite time. He had the sole management of the business, and so far as the record discloses, was the only one connected therewith authorized to make such contracts. It is a fundamental rule that, where the principal confers upon his agent authority to transact business in reference to which there is a well-known usage or custom, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that such authority was conferred in contemplation of the usage, and third persons who deal with the agent in good faith and in the exercise of reasonable prudence will be protected. *Steinke v. Yetzer*, 108 Iowa, 512; *Davenport v. P. M. & F. Ins. Co.*, 17 Iowa, 276; *Ceeder v. Loud & Sons L. Co.*, 86 Mich. 541. There was ample evidence that it was the custom in the territory where the defendant operated to employ grain solicitors for a term of one year or longer. The contract to pay the plaintiff from the 15th day of August was ratified by the defendant, and there was also evidence tending to show that the entire contract was ratified.

It is said that the verdict was contrary to the instructions on the question of using due diligence to obtain other employment. Without determining whether the burden was properly placed in the instructions, we are clearly of

the opinion that there was sufficient evidence on the subject to warrant the finding of the jury.

The answer of the witness Neelands that he had read of the custom in question was not prejudicial to the defendant, for the testimony of the other witnesses that there was such a custom was undisputed.

The use of the word "defendant" in place of "plaintiff" in one of the instructions could not have prejudiced the appellant. Twelve reasonably intelligent men could not have been misled thereby, if they paid the least attention to the instructions as a whole, or to the meaning of that paragraph.

The appellant's answer alleged that it discharged the plaintiff on the 30th day of April, 1903, and that he was not thereafter in its employ. On the cross-examination of the plaintiff, he testified that he had said to another employé of the defendant that he should stand by the manager, Stuhr. This conversation was in May, after the appellant had discharged Stuhr, and after it had discharged the plaintiff, according to its answer and its evidence. The statement was not so inconsistent with the plaintiff's claim as to require an instruction on the subject of his voluntarily having left the defendant's service.

We think the verdict fully sustained by the evidence, and the judgment is *affirmed*.

R. S. HUSTED V. KATE DOUGLAS WILLIAMS, ET AL., Appellants.

Continuance to take depositions. Under Code, section 3652, a party may elect to take his evidence by deposition, and he is entitled to a reasonable time in which to do so; and after issue joined, there being no order to take the evidence during the term, nor a showing of sufficient time had such order been entered, he is entitled to a continuance.

Appeal from Madison District Court.—HON. JAS. D. GAMBLE, Judge.

TUESDAY, FEBRUARY 14, 1905.

IN an action to quiet title, commenced by published notice, plaintiff secured judgment against defendants by default. Thereafter defendants moved to set aside the default, and, being allowed to make defense, a decree was entered for plaintiff. Defendants appeal.—*Reversed.*

Steele & Robbins, for appellants.

John A. Guiher, for appellee.

MCCLAINE, J.—The petition was filed in February, 1901, and in May of the same year a decree on default was rendered in plaintiff's favor. In July, 1902, defendants filed their motion for retrial, which was amended in September, 1903. On September 30, 1903, the defendants filed their answer to the original petition, and had entered of record their election to take testimony in the form of depositions, and thereupon moved for a continuance for that purpose. This motion was overruled, and the ruling is urged as error.

Defendants had the right, under Code, section 3652, to elect to take their evidence by depositions, and they were entitled to a reasonable time in which to do so. As depositions could not be taken during the pendency of the term of court (Code, section 4688), except by order of court, a continuance should have been granted, under Code, section 3663, for this purpose. Until issue was joined, defendants could not be required to prepare for the taking of depositions, and they were therefore not negligent in not sooner procuring their evidence, although a considerable time had elapsed after the filing of the motion to set aside default. Perhaps the de-

fendants might have had an order of court to take depositions pending the term, but there is nothing in the record to indicate that such permission, if secured, would have enabled them to take their depositions in time for trial of the case during the term.

The action of the trial court in refusing to grant a continuance was error, and the decree in favor of plaintiff is therefore *reversed*.

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| 123 | 63 |
| 138 | 587 |

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| 126 | 636 |
| 141 | 223 |

WILLIAM CROSS, Appellant, v. HENRY SNAKENBERG, Treasurer, etc., Appellee.

Taxation: CREDITS. The deferred payments due on a mutually obligatory contract for the sale of land are taxable as a credit under Code, section 1308.

Appeal from Keokuk District Court.—HON. W. G. CLEMENTS, Judge.

TUESDAY, FEBRUARY 14, 1905.

THIS is an appeal from the action of the defendant, as county treasurer of Keokuk county, in making an assessment against plaintiff, a resident of said county, as upon moneys and credits omitted from assessment and taxation for the year 1901. The court below sustained the assessment, and plaintiff appeals.—*Affirmed*.

Brown & Willcockson, for appellant.

Voris & Haas, for appellee.

BISHOP, J.—In April, 1900, the appellee, Cross, entered into a contract in writing with one Hartzel for the sale of certain real estate owned by him and situated in Keokuk county. As far as material to an understanding of the mat-

ter of controversy now before us, the provisions of said contract were that Cross bound himself in a penal sum named, the condition being that, if Hartzell should pay \$1,000 January 1, 1902, and \$1,000 January 1, 1903, according to the tenor of two promissory notes bearing date even with the contract, and further should on the date last mentioned execute notes and mortgage securing the same in the additional sum of \$6,000, to be paid in four annual payments, he (said Cross) would then convey the real estate described. Further on the contract provides that "the forfeiture above named (\$1,000) is to be binding equally on both for a failure to comply fully with this contract. Second party to have possession of the premises March 1, 1901, and pay 6 per cent. interest on the full \$8,000 from date named. * * * also all taxes assessed on said premises from the date hereof." It is further provided that the stipulations of the contract are to bind the heirs, legal representatives, and assigns of both parties, and in the event of nonpayment the first party might elect to declare the contract at an end, in which event the second party should be regarded as a tenant at will, etc. The contract is signed by Cross alone, but it is agreed that the same was delivered to Hartzell, and by him made a matter of record. Hartzell executed and delivered the two notes for \$1,000 each, and the same were shortly thereafter, and during the year 1900, negotiated by Cross. Hartzell paid the taxes of 1901 on the real estate in question. In 1902 the contract was completed by the payment by Hartzell of the remaining \$6,000 of the purchase price and the conveyance to him of the land by Cross.

The assessment complained of was based on the \$6,000 payment provided for in said contract, and this upon the theory that the same constituted a credit within the meaning of section 1308 of the Code. That section contains a general designation of taxable property and included therein are "credits, * * * property or labor due from solvent debtors on contract or judgment, mortgages or other like se-

curities, accounts bearing interest," etc. In the succeeding section "credits" are defined as including "money secured by deed, title bond, mortgage or otherwise." The contention of appellant is based wholly upon the provisions of the written contract, and it is pointed out that said contract was not signed by Hartzell, and that it contains no agreement in form of words on his part to make the \$6,000 payment. The argument is that, accordingly the writing must be construed as a mere option to purchase on the part of Hartzell, and without any agreement on his part to make the payment: that, as there was no enforceable contract in favor of appellant there was no "credit" subject to taxation. We think the argument thus made is fully answered by what was said in *Flanders v. Merrill*, 38 Iowa, 583. There a contract similar in its terms to the one we have before us, and delivered as in this case, was construed to be binding upon both parties. "The true question in all cases is as to the intention of the parties. If from the writing it is clear and plain beyond doubt that a unilateral contract was intended to be made, then it will be so held. If, on the other hand, it is not clear and beyond doubt that such was the intention of the parties, * * * it will be presumed that in making their contract they intended it to be mutually obligatory." See, also, *Dows v. Morse*, 62 Iowa, 231; *Muscatine W. Co. v. Muscatine L. Co.*, 85 Iowa, 112; 7 Am. & Eng. Enc. (2d Ed.) 142. We conclude, as did the court below, that appellant was possessed of a credit arising out of the contract such as that the assessment made thereon for the purposes of taxation was proper.—*Affirmed*.

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| 126 | 638 |
| 132 | 585 |

HANS KUEHL, Appellee, v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

Railroads: NEGLIGENCE: PROXIMATE CAUSE. Whether the negligent
1 failure of a railway company to sound the engine whistle as the

train approached a public crossing was the proximate cause of the injury to cattle being driven over the crossing, was a question of fact for the jury.

Contributory negligence: EVIDENCE. In an action for injury to cattle at a public railway crossing, the evidence as to plaintiff's contributory negligence is held to present a question of fact for the jury.

Special interrogatories. Inaccurate answers to special interrogatories not calling for ultimate facts, nor for facts of such importance that a finding thereon against the weight of the testimony is necessarily indicative of passion, do not constitute ground for setting aside the general verdict.

Appeal from Monona District Court.—HON. JOHN F. OLIVER, Judge.

TUESDAY, FEBRUARY 14, 1905.

ACTION at law to recover damages for injury to live stock. Verdict and judgment for plaintiff, and the defendant appeals.—*Affirmed.*

Shull & Farnsworth, for appellant.

Will E. Johnston and *Geo. H. Clark*, for appellee.

WEAVER, J.—The accident complained of occurred upon a crossing of the defendant's railroad and public highway. The highway at this point extends east and west. From the crossing westward the highway has an upward slope to the top of a hill eight hundred feet distant. Extending northward from the crossing the railroad curves to the west, and disappears around the point of a hill at a distance variously estimated at six hundred to nine hundred feet. On the day in question the plaintiff, with the assistance of three other persons, was driving a herd of one hundred and sixty yearling and two year old steers from the west along the public road above mentioned. For convenience in handling, the herd was separated into three "bunches," each in charge of a

man on horseback, while the plaintiff and another person rode in a buggy behind the last bunch. The plaintiff's testimony tends to show that the several bunches were moving in somewhat close order, and that when the head of the herd reached the crossing plaintiff and his companion had arrived at the top of the hill. It also tends to show that as the first of the cattle approached the crossing the man in charge at that point looked and listened to ascertain if any train was coming, and, discovering none, rode on ahead of the herd to the railway track, where he stopped, and again looked and listened. Satisfying himself that no train was near, he then rode back toward the rear of his section of the herd, which began moving across the track, and almost immediately a passenger train, moving from the north, reached the crossing, and struck and killed eight steers. It is the claim of plaintiff and his witnesses that the defendant's engineer failed to sound the whistle or ring the engine bell, as required by law, in approaching the crossing, and upon this alleged omission the charge of negligence is grounded.

I. For a reversal of the judgment below the appellant relies upon the proposition that the evidence does not sustain the finding of the jury. It is not denied that there was testimony from which the jury might properly have found that defendant was negligent in respect to the crossing signals, but it is said there is nothing to show that this negligence was the proximate cause of the accident. If absolute demonstration that the failure to give a signal is the direct cause of a crossing accident is to be required, no verdict could ever be had against a railway company in an action of this nature. No one can tell what might have been the result had the signal been duly given. The person approaching the crossing might not have heard it. Had he heard it, he might not have heeded it. A thousand other contingencies may be imagined casting some degree of doubt upon the conclusion that the signal, if given, would have prevented the collision. But,

1. NEGLIGENCE:
proximate
cause.

taking the ordinary experience of mankind, there is room for a reasonable presumption that a signal at a distance of sixty rods or more gives time for persons at or near the crossing to avoid danger, and that persons of ordinary prudence, hearing the warning, will take the necessary precaution to insure their safety. It is not the rule that men willfully or knowingly expose themselves to death, or their property to certain destruction. On the contrary, love of life and self-interest lead the average man to exercise prudence in the presence of peril. Had the warning been given, the collision with plaintiff's cattle may not have been avoided, yet the jury may very reasonably and properly have believed that plaintiff or some of his assistants would have improved the opportunity thus afforded to clear the crossing and prevent the injury.

Again, it is said that the evidence shows beyond controversy that plaintiff was guilty of contributory negligence. Appellant states correctly the oft-approved rule that ordinary

care requires a person approaching a railway crossing to look and listen for trains, and, if there is one in plain sight or hearing, so circumstanced as to suggest reasonable probability of danger, he cannot enter upon the track without negligence which will defeat his recovery of damages for injury thus received. But this statement of circumstances is not so clearly or indisputably shown here in the case at bar that we can say as a matter of law that plaintiff was guilty of such negligence. On the contrary, the testimony is that the man with the leading section of the herd did both look and listen, and took the precaution to ride ahead of the steers in order to look up the track from the crossing itself. We are not authorized to say he does not tell the truth when he says he did thus act, and that no train was in sight. The longest distance at which appellant claims the train could be seen from the crossing is nine hundred and thirty-eight feet, a space which would be compassed by a fast train in a very few seconds. The witness, after looking from the crossing,

2. CONTRIBUTORY
NEGLIGENCE:
evidence.

and finding the track apparently clear, turned back to his cattle for the purpose of taking them over the track. The performance of this duty would naturally engage, or at least divide, his attention for a brief period, in which the train may have had time to round the point of the hill, and, in the absence of proper warning, bring about the collision without negligence on his part. Under such circumstances it became a fair question whether the plaintiff or his driver with the advanced section of the herd exercised reasonable care for the safety of their cattle.

II. The court, on its own motion, submitted to the jury two special interrogatories, as follows: “(1) Was there anything to obstruct the view of the track or approaching train between the highway along which the cattle were driven at any point within one hundred and fifty feet from the crossing to the point of the hill north of the highway, and around which the railway track ran? (2) Could the train have been seen from a point in the highway on which the cattle were being driven anywhere from twenty feet to one hundred and fifty feet from the crossing, as soon as it turned the point of the hill to the north of the crossing?” The first interrogatory was answered in the affirmative, and the second in the negative. It is said these answers are so clearly without support in the evidence that the general verdict should have been set aside. Such is not our view. In the first place, the situation to which these inquiries were directed was the matter of considerable dispute and uncertainty in the evidence, and while we think the weight of the testimony tended to support the appellant’s theory as to the distance a train could be seen from the crossing, it is not so clear concerning the view from points west of the crossing that we can say the findings are clearly without support. However this may be, the interrogatories do not call for ultimate or controlling facts, nor for facts of such importance that a finding thereon against the weight of the testimony is necessarily indicative of passion or preju-

3. SPECIAL IN-
TERROGA-
TORIES.

dice. For a case very like the one at bar in respect to special interrogatories, see *Pence v. Railroad*, 79 Iowa, 389, where it was held that an inaccurate answer afforded no ground for setting aside the general verdict.

This appeal presents little for consideration save the ever-recurring question whether the evidence supports the verdict of the jury. Having concluded, from an examination of the record, that we cannot properly disturb the verdict on this ground, there is no occasion for a review of the authorities to which counsel on either side have called our attention.

The judgment of the district court is *affirmed*.

HARTMAN & DANIELS v. DANIEL HOLLOWELL, Appellant.

Fire insurance: AGENCY. One who upon his own request submits
1 the application of a property owner for fire insurance to a foreign agency, is the agent of the company accepting the same and issuing a policy, under Code, section 1749.

Transaction of business of foreign companies: STATUTES. Issuance
2 and delivery of a fire policy by a foreign insurance company, covering property in this State, constitute the transaction of business in the State within the meaning of the statutes regulating the insurance business.

Unauthorized insurance: LIABILITY OF AGENT. Under the statutes
3 regulating the transaction of insurance business, an agent effecting insurance on property in this State with a foreign company which is insolvent and unauthorized to do business in Iowa, is personally liable to the assured in case of loss, whether he actually knew of the insolvency of the company or not.

Presumption of authority to insure. The assured may rightfully
4 assume that a company issuing a policy of insurance is authorized to do business in this State, in the absence of information to the contrary.

Appeal from Clinton District Court.—HON. P. B. WOLFE,
Judge.

TUESDAY, FEBRUARY 14, 1905.

ACTION for damages. From judgment as prayed, the defendant appeals.— *Affirmed.*

L. E. Schmitt and *A. L. Pascal*, for appellant.

Barker, Ellis & McCoy, for appellees.

LADD, J.— On or about April 15, 1902, there were issued to plaintiffs two policies of insurance — one by the Great Britain Insurance Corporation, Limited, of London, England, and the other by the Northwestern Fire Insurance Company of Chicago, Ill., for \$1,000 each — covering their implement warehouse and feed mill, together with machinery, etc., located at Low Moor for one year. The property was destroyed by fire in June following, and subsequently judgments were obtained against each company for \$950. These have not been collected, and in this action recovery is sought against the defendant on the ground of negligence in acting as agent without authority for companies not entitled to do business in the State and insolvent when the policies were issued. The petition also stated a cause of action for deceit, but this was not submitted to the jury. It appears that some time in February, 1902, defendant had solicited the plaintiffs for insurance, and, as recording agent, issued to them a policy in another company; but this was canceled, owing to its rule against carrying risks on feed mills. Some farther effort was made, when defendant advised them he might be able to get the risk written through the agency of a firm in Chicago, and with plaintiffs' approval he addressed a letter to C. A. Van Anden & Co., saying: "Can you place the enclosed risk for me? * * * Place it in the best company you have. Send statement of company." In response to this Van Anden &

Co. sent the policies in question to him, and he forwarded them to plaintiffs, inclosing a letter stating: "These are subject to your acceptance within one week; if not accepted return; if satisfactory send check for \$40. I succeeded in getting it at a \$2 rate. I enclose financial statement of both companies. These are both stock companies. \$40 will be the absolute cost." The plaintiffs retained the policies and paid him the premium.

I. Appellant first contends that the evidence failed to show that he should be regarded as the agent of the companies. Section 1749 of the Code provides that "any person who shall hereafter solicit insurance or
1. FIRE INSUR-
ANCE: agency. procure applications therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding." The evidence in behalf of plaintiffs tended to show that defendant requested them to allow him to procure insurance on their property through the agency in Chicago, and if the jury so believed, then he was, under the law as stated in this statute, agent for the companies issuing the policies delivered through him. *St. Paul Fire Ins. Co. v. Sharer*, 76 Iowa, 282. True, he denied having made such request, and insisted that what he did was at the instance of the plaintiffs. This merely raised a conflict in the evidence, which was fairly submitted to the jury.

II. Neither company was authorized to do business in Iowa or Illinois, and the evidence showed both to have been insolvent when the policies were issued. Nor did the
2. TRANSACTION
OF BUSINESS
BY FOREIGN
COMPANIES:
statutes. defendant have a certificate qualifying him to act as their agent in this State. The court instructed the jury that: "If you find from the evidence that the defendant was the agent of the insurance companies, and that as such agent he caused to be written and procured for the plaintiffs the policies in question, and

on your further finding that the policies in question were written by companies not authorized to do business in this State, and that said companies were at the time said policies were written insolvent, that the plaintiffs did not know when they accepted and paid for said insurance that said companies did not have authority to write insurance in Iowa, the defendant, as their agent, is liable, and your verdict should be for the plaintiffs." This was a correct statement of the law. The statutes regulating the transaction of the insurance business in this State were enacted for the protection of policy holders, and especially to guard those seeking indemnity against loss from deception by companies incapable of performing their contracts and agents not authorized to bind them.

By section 1721 of the Code foreign companies are prohibited from directly or indirectly taking risks or transacting any insurance business in this State, unless possessed of \$200,000 of actual paid-up capital; and by the section following, as a condition precedent to doing business, each is required to file with the Auditor of State authority to accept service of notice of the beginning of suit:

A certified copy of its charter or deed of settlement, together with a statement under oath of the president, vice president or other chief officer and the secretary of the company for which they may act, stating the name of the company, the place where located, the amount of its capital, with a detailed statement of the facts and items required from companies organized under any law of the State in which such company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by liabilities as specified in this chapter to the extent of twenty per cent. thereof, while such deficiency shall continue.

Only upon compliance with these requirements will any foreign company become entitled to do business and receive a certificate from the Auditor of State. Section 1724, Code.

Section 1725 prohibits any agent acting for any such company "in taking risks or transacting business of insurance in the State, without procuring from the Auditor of State a certificate of authority to the effect that such company has complied with all the requirements of this chapter." Section 1747 requires all companies doing business in this State to conform with the foregoing provisions, and provides that:

Any officer, manager or agent of any insurance company or association who, with knowledge that it is doing business in an unlawful manner, or is insolvent, solicits insurance with said company or association, or receives applications therefor, or does any other act or thing towards procuring or receiving any new business for such company or association shall be guilty of a misdemeanor, and for every such act, on conviction thereof, shall be adjudged to pay a fine of not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment.

Section 1748:

Any president, secretary or other officer of any company organized under the laws of this State, or any officer or person doing or attempting to do business in this State for any insurance company organized either within or without this State, failing to comply with any of the requirements of this chapter, or violating any of the provisions thereof shall be fined in a sum not exceeding one thousand dollars, and be imprisoned in the county jail for a period of not less than thirty days nor more than six months.

Issuing these policies and delivering them to plaintiffs was doing business in this State within the meaning of these statutes. *Seamans v. Zimmerman*, 91 Iowa, 363; *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 95 Iowa, 31.

And the defendant, in soliciting insurance in the State, if he so did, was equally guilty of violating the law. By soliciting the insurance and delivering the policies he impliedly represented the companies were authorized to do business here, and he to act for them. Had this been true, it is

to be assumed that they would have been solvent, and their policies enforceable. Plaintiffs, in the absence of knowledge to the contrary, had the right to assume that both the companies and the defendant had complied with the law. That neither had so done must have been known to the defendant, as he had no certificate from the State Auditor as their agent. He may not have known that they were insolvent, and this is all that saves him from liability in an action for deceit. But he was holding himself out as being in the business of procuring insurance, and thereby assumed to have the requisite information, ability, and skill to conduct such business properly, and in doing so was bound to exercise reasonable care and judgment with respect to the indemnity for which insurance was sought. In seeking patronage he must be held to have been cognizant of the law with reference to foreign companies doing business in the State, and the necessity of his being authorized to act by the Auditor of State; and if in ignorance of the statutes or the criminal consequences resulting therefrom he was negligent in the matter of not possessing the degree of knowledge exacted from those following his vocation; so, too, was he negligent, if, having such knowledge, he solicited and procured the insurance for companies prohibited from doing business in this State. In either event he is justly chargeable with the injurious consequences to those whose confidence in his assumed judgment and skill has been misplaced. The defendant does not pretend to have supposed these companies were authorized to do business in the State, and his only apology to relieve him from the charge of negligence is that he acted at the instance of the plaintiffs in obtaining insurance from companies neither knew anything about. But whether he so did was an issue for the jury to determine. As directly in point, see *Burges v. Jackson* (Sup.) 46 N. Y. Supp. 326, approved by the Court of Appeals, 57 N. E. Rep. 1105; *Morton v. Hart*, 88 Tenn. 427, 12 S. W. Rep. 1027; *Landusky v. Beirne* (Sup.) 80 N.

3. UNAUTHORIZED INSURANCE: liability of agent.

Y. Supp. 238; approved by the Court of Appeals, 70 N. E. Rep. 1101.

In *Morton v. Hart*, the court, after referring to statutes substantially like those of this State, said:

The defendants were undertaking to do an unlawful and prohibited business. In such undertaking they must be held to guaranty the solvency of the concern they represent to the extent of the requirements of our statutes as cited, and that losses will be paid here. The law was intended to protect the citizen policy holder, and give him redress in the courts of this State. If the company was not worth \$200,000 in actual paid-up cash capital, the undertaking of the agent supplies that want for the benefit of the insured; and, if loss occurs, the agent must respond to the insured, and look to his principal for indemnity.

See *McCutcheon v. Rivers*, 68 Mo. 122. Expressions contrary to this view may be found in *Jones v. Horn*, 104 Mo. App. 705 (78 S. W. Rep. 638), but the decision is based upon the failure to prove the company for whom Horn acted, insolvent.

III. It cannot be said that defendant's letter accompanying the policies required plaintiffs to investigate and determine for themselves. They had the right to assume, in the absence of information to the contrary, that

4. PRESUMPTION
OF AUTHORITY
TO INSURE.

the companies were such as were entitled to do business in this State. The letter contained nothing to the contrary. If they were advised that they would have to take their own risk as to the character of the companies, this happened in a conversation. But that issue was left to the jury. The rulings on the admissibility of the evidence were so manifestly correct as not to demand discussion. The verdict has such support in the evidence as to preclude any interference on our part.—*Affirmed.*

HENRY SNAKENBERG, as Treasurer of Keokuk County, Iowa,
Appellant, v. BARBARA STEIN, Appellee.

Taxation: LISTING OF OMITTED PROPERTY. The county treasurer need
1 not list omitted property for taxation on the day specified in
the notice to the taxpayer to appear and show cause why the
same should not be listed and taxed, but may do so within a
reasonable time thereafter.

Assessment in wrong district: REASSESSMENT. Moneys and credits
2 should be listed and assessed to the owner in the district in
which he resides, although in the possession of agents residing
elsewhere, but when the property has been listed in good faith
by such agents in another township of the same county and
the tax levied thereon paid, the county cannot collect back taxes
thereon for the same year in the district of the owner's resi-
dence, without offering to return the tax previously paid.

Assessment in wrong county: REASSESSMENT. The assessment and
3 payment of taxes in the wrong county will not preclude taxa-
tion of the property for the same year in the county of the
owner's residence, and the collection thereof as omitted taxes.

Appeal from Keokuk District Court.—HON. BYRON W.
PRESTON, Judge.

WEDNESDAY, FEBRUARY 15, 1905.

ACTION at law to recover taxes upon moneys and credits
alleged to have been omitted from assessment. Judgment
for the defendant, and plaintiff appeals.—*Modified and af-
firmed.*

Voris & Haas, for appellant.

F. L. Goldner, for appellee.

WEAVER, J.—The facts upon which this controversy
depend are not in dispute. During all of the years 1900,

1901, and 1902, and for a considerable time prior to that period, the defendant Barbara Stein was a resident of Sigourney, Keokuk county, Iowa. During all of the years named Mrs. Stein was the owner of moneys and credits in excess of debts and liabilities to the amount of several thousand dollars. In the year 1899, being of advanced age and in failing health, she delivered said property into the possession of her son-in-law, Joseph Kramer, a resident of Lafayette township, in Keokuk county, and gave him a power of attorney to keep and manage the same for her. Kramer listed the property with the assessor for taxation in Lafayette township for the years 1900 and 1901, and taxes were regularly levied and paid upon such assessment. On January 10, 1902, Kramer relinquished the trust, which was then by Mrs. Stein transferred to her son, Peter Stein, a resident of Washington county. Peter Stein assumed possession and management of the property, and listed it for taxation for the year 1902 in Washington county, and taxes were there levied and paid. For neither of the three years mentioned did Mrs. Stein return any moneys or credits for taxation in Sigourney, nor were any taxes in fact levied or paid thereon in said taxing district. On August 26, 1903, certain so called "tax ferrets" employed by the county brought the matter to the attention of the county treasurer, and, on the claim that said property was properly assessable in Sigourney for each of said years, said treasurer gave notice to Mrs. Stein to appear on September 7, 1903, and show cause why said moneys and credits should not be listed as property omitted from assessment in Sigourney for the years 1901, 1902, and 1903. On the day named a hearing was had before the treasurer, and on September 10, 1903, he assessed the said moneys and credits to Mrs. Stein as a resident of Sigourney for each of the years named. From this action an appeal was taken to the district court, which reversed the order made by the county treasurer, and vacated the assessment made by him. The matter is now before us upon the appeal of the treasurer.

I. It is insisted that as the treasurer did not list the property on September 7, 1903, the day named in the notice, his subsequent listing thereof was without jurisdiction and void. We think this cannot be correct. Mrs.

1. LISTING OF
OMITTED
PROPERTY.

Stein did appear to the notice and made her objection to the assessment. We see no reason why the treasurer, after hearing the objections and the testimony offered, if any, may not take a reasonable time to consider the matter before making the entry upon his books. The entry was in fact made on September 10th, but three days after the hearing, and is not in our judgment open to the objection here raised.

II. We regard it beyond question that the moneys and credits of Mrs. Stein were property assessable to her in Sigourney for each of the three years 1900, 1901, and 1902.

2. ASSESSMENT
IN WRONG
DISTRICT:
reassessment.

Code, sections 1313, 1350, 1354; *German T. Co. v. Board*, 121 Iowa, 325. She resided there during all the time, and the possession of her property by her agents and attorneys, though residing elsewhere, was her possession, and, under the statute as interpreted by this court in the *German Trust Company Case*, it was her duty to list the property with the assessor of Sigourney. The appellant concedes that in failing to so list the property in Sigourney, and that in causing it to be listed in Lafayette township and thereafter in Washington county, Mrs. Stein and her said agents acted in good faith, and without any fraudulent or wrongful purpose to evade taxation.

We have, then, to consider whether, in a proceeding to collect taxes upon property alleged to have been omitted from assessment in the proper taxing district, it is a sufficient defense to show that the property was in fact taxed for the years in question in another district. Ordinarily speaking, we think this question would have to be answered in the negative. To hold otherwise, would be to open the door to both fraud and confusion. As a rule, we think the taxing officers of the proper district may ignore an attempt to assess property

elsewhere as being without jurisdiction and void, but cases may arise where equitable consideration will estop the officers from an insistence upon such claim. Such considerations exist in this case as to the taxes for the years 1900 and 1901. The property was all assessed in Lafayette township, Keokuk county. The county, by its officers, levied taxes upon this assessment. Its treasurer collected them, and the moneys thus arising have presumably been distributed among the various public funds. They have not been returned, nor is any return tendered. We do not think the county nor those for whose benefit the taxes were collected should be permitted, while accepting the benefit of the erroneous tax, to insist upon its invalidity and compel the defendant to pay it a second time. If it be said that this may result in the loss of some revenue by the city of Sigourney, we can only say that there is no injustice in holding the city bound by the act of its trustee, the county treasurer. We might also add that Mrs. Stein was at all times a resident of Sigourney, and the assessor and board of review of that city could have placed the property on the tax list had they been so minded. She is admitted to have practiced no fraud or concealment in the matter, and, in the absence of bad faith, we do not think the court should permit itself to be made an instrument for extorting double taxation for the benefit of the same county.

The reasons here adverted to do not apply with like force to the tax of 1902. In that instance the property was taken into another county and was there taxed. Neither Keokuk county nor its officers were in any manner instrumental in assessing or taxing it for that year, and no part of the revenue therefrom was collected or received by said county or by its agents or officers. The assessment in Washington county was void, and while defendant paid it in good faith, such payment will not excuse her from paying the tax duly levied in the proper taxing district, in the absence of any equities to estop such collection.

3. ASSESSMENT
IN WRONG
COUNTY: re-
assessment.

We therefore hold that the judgment appealed from should be affirmed as to the taxes for 1900, and that as to the tax for 1902 the assessment made by the treasurer should be affirmed. Costs taxed two-thirds to the appellant, and one-third to the appellee.—*Modified and affirmed.*

FREDDIE E. RICE, by his next friend, W. N. JONES, Appellant, v. J. B. BOLTON, ET AL.

Pleadings: FILING: DISCRETION. The subsequent approval of the
 1 filing of a pleading is as effective as though permission had been granted in advance; and the court's discretion in permitting the dilatory filing of pleadings will not be disturbed on appeal in the absence of its abuse.

Appointment of guardian ad litem: SALE OF INTESTATE LANDS: COL-
 2 LATERAL ATTACK. An order of court appointing a guardian *ad litem* and directing the sale of a minor's property after service of notice but prior to the date specified therein, though irregular, is not subject to collateral attack where no application for its correction was made during the term and the record was subsequently approved.

Sale of intestate's land: DESCRIPTION: PRESUMPTION. In a suit to
 3 set aside the sale of an intestate's lands, the description of the same in the order of sale will be presumed to exemplify what was intended, in the absence of an averment to the contrary.

Limitation of actions. The statute of limitations will not run
 4 against an infant, except for a forfeiture or penalty, until one year after majority.

Appeal from Mahaska District Court.—HON. W. G. CLEMENTS, Judge.

WEDNESDAY, FEBRUARY 15, 1905.

MARY E. RICE died intestate January 18, 1890, seised of the east half southwest quarter section 17, township 77 north, of range 14, in Mahaska county. Her husband, David E. Rice, was appointed administrator of her estate, and on

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| 126 | 654 |
| 140 | 87 |

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| 126 | 654 |
| e143 | 72 |
| e143 | 73 |

January 30, 1890, filed a petition praying for an order to sell said land. Notice was served on Freddie E. Rice, the only child of the deceased, then seven years old, to appear on the 2d day of the next term of court, which convened February 18, 1890; but a guardian *ad litem* was appointed on the first day of the term, filed his answer on the same day, and the order of sale was likewise entered by the court on the first day of the term. This directed the sale of the south, instead of the east, half of the quarter section. On the 26th of May, 1890, the administrator conveyed the land to J. B. Bolton, a member of the firm of Bolton & McCoy, his attorneys, for \$1,200, and the sale was subsequently approved. The proceeds of the sale were used in paying two mortgages on the land, amounting to \$930, and other debts of the estate. On October 29, 1890, Bolton deeded the land to McSpadden, and October 2, 1894, the latter conveyed it to Anne E. Smith, who executed a mortgage thereon to John Nash. Mrs. Smith conveyed the premises to E. C. Lambert September 22, 1897, who, on April 1, 1902, executed a mortgage thereon to secure the payment of \$900 to John Nash. Because of the irregularities noted, the plaintiff prayed that the sale and conveyance of the undivided two-thirds of the land inherited by him be set aside, and that the title thereto be established in him free of all liens or incumbrances. His petition was dismissed, and he appeals.—*Modified.*

Carver & Wooster, for appellant.

McCoy & McCoy and *L. C. Bolton*, for appellees.

LADD, J.—In an amendment to the petition the plaintiff alleged the execution of a mortgage on the land to Nash, and as against him asked full relief. Nash, by his attorney, filed a separate answer. But the notice of appeal was neither served on him nor his attorney. For this reason the motion to dismiss the appeal as to Nash is sustained.

II. The defendants, other than the administrator and Nash, answered on the 6th day of August, 1900. Afterward the files were lost, and the parties agreed that copies might be substituted. The trial occurred on the 25th

1. PLEADINGS:
filing; discretion.

day of June, 1902, when the cause was submitted and taken under advisement, with an agreement that a decree might be entered in vacation. On the 9th day of July, 1902, during the same term of court, said defendants, without leave, filed an "answer to meet proofs," setting up adverse possession. On the 5th day of August following, and during the same term, the court entered an order that "the defendant is permitted to file amended answer." On November 15, 1902, said defendants, without farther leave, filed a substituted answer. The plaintiff moved that these pleadings be stricken for that they raised new issues, and were filed without permission, long after the cause had been submitted. The motion was overruled on the 30th of January, 1902, the following entry being made: "It appearing that the original answer of J. B. Bolton *et al.* was lost, and cannot be found, it is ordered that the entry filed November 15, 1902, together with the amendment filed July 9, 1902, shall be regarded as a substituted answer for the one lost." The record contains nothing to indicate that any new issues were raised by the substituted answer, and whether leave to file was obtained is wholly immaterial, for the subsequent approval of the filing of a pleading is quite as effective as though permission had been granted in advance. Dilatory tactics in making up issues cannot be approved, but such matters are in the control of the trial court, and, save upon a clear showing of abuse of discretion, this court will not interfere.

II. Mary E. Rice died January 18, 1890, seised of the land in controversy, and leaving her surviving a husband, David E. Rice, who was appointed administrator of her estate, and one child, the plaintiff, then seven years old. The land was incumbered by two mortgages, both of which were

due, to the amount of \$930, and was worth from \$1,200 to \$1,600. The administrator applied immediately for an or-

2. APPOINTMENT
OF GUARDIAN
AD LITEM:
sale of inter-
state's land;
collateral
attack.

der to sell, and in the notice thereof served on plaintiff fixed "before noon of the second day of February term, A. D. 1890, of said court, which will commence on the 18th day of February,"

as the time in which to appear and defend. Instead of waiting until then, the guardian *ad litem* was appointed on the first day of the term, immediately filed an answer, and the order of sale was entered on the same day. It is claimed that these orders were without jurisdiction. The necessity of defense by a guardian *ad litem* is not questioned. Section 3482 of the Code. And undoubtedly the appointment may not be made until "after the required service of the notice in the action." Section 3483, Code. As the plaintiff was under fourteen years of age, the appointment might have been on the application of a friend or of the plaintiff in the action. Section 3484, Code. But the statute does not designate the time when the guardian *ad litem* shall be appointed. It would seem that this should not be done until jurisdiction has been acquired by completed service. In no case called to our attention, however, has an appointment before that time, the record of which has been subsequently approved, been declared illegal. In *Allen v. Saylor*, 14 Iowa, 435, the service was not such as to confer jurisdiction at any time, and on this ground it was held that, "unless there is a complete service upon the minor, the court has no jurisdiction to appoint a guardian *ad litem*." In *Good v. Norley*, 28 Iowa, 188, there was no service whatever. In *Lyon v. Vanatta*, 35 Iowa, 521, the notice required the minor to appear at a time when no term of court was held, and was adjudged no notice. In *Haws v. Clark*, 37 Iowa, 355, the time fixed for appearance was not on a regular term day of the court, and was declared no notice at all. See, also *In re Hunter*, 84 Iowa, 388. In *Wickersham v. Timmons*, 49 Iowa, 267, an appointment of a guardian *ad litem* after the trial had begun was approved.

Had the child been of an age when the law allowed him to select a guardian, probably he might have selected one in advance. *McConnell v. Adams*, 3 Sandf. 729. But the appointment of a guardian *ad litem* is not jurisdictional. Had it been omitted entirely, this would have been an irregularity which would not have rendered the judgment void. *Drake v. Hanshaw*, 47 Iowa, 291; *Myers v. Davis*, 47 Iowa, 325; *Hoover v. Kinsey Plow Co.*, 55 Iowa, 668. And, as a general rule, the entry of judgment after service, but before the time allowed for appearance, is also regarded as an irregularity, to be corrected in a direct proceeding as by appeal, motion, or the like. 1 Black on Judgments, section 85; *White v. Crow*, 110 U. S. 183 (4 Sup. Ct. 71, 28 L. Ed. 113); *Mitchell v. Aten*, 37 Kan. 33 (14 Pac. Rep. 497, 1 Am. St. Rep. 231); *Whitewell v. Barbier*, 7 Cal. 54; *Town of Lyons v. Cooledge*, 89 Ill. 529; *Porter v. Partee*, 7 Humph. 169. The same rule is applicable to a judgment against an infant. It might have been corrected during the term by any person who chose to interest himself in the infant's behalf on the day or thereafter during the term he was required to appear by a friend, or possibly by an *amicus curiæ*. Nothing of the sort was done, and the record was subsequently approved. It cannot now be attacked collaterally. *Spurgin v. Bowers*, 82 Iowa, 187. Whether such an order might be set aside under section 4091 is not involved in this action.

IV. The order entered by the court directed the sale of the south half of the quarter section, whereas the deceased was owner of the east half, though the latter was described in the petition and the conveyance of the administrator and the subsequent deeds. No order whatever was entered for the sale of the northeast quarter of the southwest quarter of the section. Possibly the omission might have been made by mistake, but that issue is not before us, and, in the absence of any averment to the contrary, we must treat the record as a verity, and as exemplifying exactly what was intended.

3. SALE OF IN-
TESTATE'S
LAND: de-
scription;
presumption.

V. As this action was begun before plaintiff attained his majority, the statute of limitations had not run against him. See, sections 3447, 3453, Code.

4. LIMITATION
OF ACTIONS.

VI. The plaintiff claims rents and profits on the land since 1890, and, of course, is entitled thereto since the beginning of this action. As a farther accounting must be had in any event, we have concluded to remand the cause to the district court for the purpose of ascertaining the entire amount to which plaintiff is entitled. With the modification indicated, the decree will be affirmed, and the cause remanded for such accounting.

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| 126 | 659 |
| 131 | 35 |
| 126 | 659 |
| 134 | 377 |

ALBERT WOLF, Appellant, v. DES MOINES ELEVATOR CO.,
Appellee.

Appeal: ABSTRACT. It does not necessarily follow from the fact
1 that the cross-examination of certain witnesses does not appear in appellant's abstract, that the same does not contain the substance of the evidence as required to be set out; this objection should be met by an amended or additional abstract.

Negligence: OPERATION OF ENGINE. The question of negligence in
2 the use of a gasoline engine for the operation of an elevator in near proximity to a traveled highway, resulting in an injury from a frightened team, was, under the evidence in the case, one of fact for the jury.

Same. The fact that plaintiff's team was not upon a public street
3 when frightened by defendant's negligent use of an engine, did not affect his liability for an injury resulting therefrom, it appearing that plaintiff was not a trespasser but upon a traveled way the use of which defendant had acquiesced in.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge.

WEDNESDAY, FEBRUARY 15, 1905.

ACTION to recover damages for a personal injury. At

the close of the evidence the court instructed a verdict in favor of defendant, and entered judgment against plaintiff for costs. From such judgment, plaintiff appeals.—*Reversed.*

Roscoe Barton, for appellant.

Carr, Hewitt, Parker & Wright and A. L. Preston, for appellee.

BISHOP, J.—It is evident that the court below directed the verdict for the defendant on the ground that the evidence produced upon the trial by plaintiff did not warrant a verdict in his favor. The appellee has filed in this court an additional abstract in which our attention is called to the fact that portions of the evidence introduced upon the trial have not been preserved and are not before us for examination and consideration. Accordingly it is said that the entire record upon which the ruling complained of was based is not in this court, and for that reason the judgment should be affirmed. It is disclosed by the additional abstract that the cross-examination of various witnesses is entirely omitted from the abstract filed by appellant. The additional abstract does not set forth such omitted evidence, and we cannot, therefore, by inspection determine the character or importance thereof. It is very true that there can be no review in this court of the correctness of a ruling directing a verdict because of the insufficiency of the evidence, unless all the evidence upon which the ruling is predicated is before us. But this does not mean that the evidence must be brought into this court in *hæc verba*. The rule requires that an abstract of the evidence shall be made and filed, and a literal transcript is required only in cases where a dispute arises, and to the end that such dispute may be settled. An abstract is an abbreviated or condensed statement, in narrative form, where possible, of the material parts of the record. As applied to the matter of evidence, it is a

1. APPEAL: abstract.

succinct statement of the facts testified to by the witnesses without unnecessary repetition. There is no rule of court or statute which requires that the abstract shall disclose what matters were testified to on direct and what on cross-examination, although to thus designate is undoubtedly the better practice. In the making of an abstract, therefore, it is the duty of counsel to include only the substance of the testimony introduced. Manifestly, if the cross-examination of a witness be found to consist of a mere repetition of his testimony given on direct examination, there could be no reason for burdening the abstract with the twice-told story. If, from the viewpoint of the appellee, there was reason for bringing forward the cross-examination, it was his undoubted right to do so by way of an amendment or an additional abstract. It follows that we cannot say, from the mere fact that the cross-examination of several witnesses does not appear in the abstract, that we have not all the evidence in the case before us.

II. Defendant is engaged in the business of buying and shipping grain at Avoca, Pottawattamie county, and in that connection owns and operates a grain elevator situate on the station grounds of the Chicago, Rock Island &

2. NEGLIGENCE:
operation of
engine.

Pacific Railway Company in said city. The building is located on the north side of the railway tracks, and in close proximity thereto. The building does not abut on any regularly laid out street, but the grounds are open to permit of free access to all buildings situate thereon. Running past the east end of defendant's building there is a traveled way across the station grounds, which connects with the streets of the city, and it appears that such way has been generally used for many years by the traveling public having occasion to pass that way. In the operation of defendant's elevator some form of power is essential, and in October, 1900, defendant installed in the engine room — which is an addition built on the north side of the main building — a gasoline engine. The exhaust pipe from such engine extends up through the roof of the engine room, and the

location thereof is about forty feet distant from the traveled way referred to. When the engine is working, loud, sharp puffs or explosions are given off through such exhaust pipe, at more or less irregular intervals. There was evidence on behalf of plaintiff tending to prove that the muffler in use by defendant — a muffler being, as we understand it, a device attached to the exhaust pipe, and through which the exhaust passes, and intended to muffle the sound of the exhaust — was ineffective for the purpose intended. There was also evidence tending to prove that, without interfering with the effective operation of the engine, the exhaust pipe could be carried to the rear of the building, or the exhaust could be conducted into a tube or vat of water, by either of which means the noise as heard from the street would be materially lessened. At the time of his accident plaintiff was driving a team of horses down the traveled way mentioned, when his team took fright from the exhaust explosions produced by defendant's engine, and ran away, resulting in the injury of which he complains.

The claim made by plaintiff for damages is predicated upon the theory that defendant was negligent in the matter of the use and operation of its elevator, and the engine therein located, thereby creating a nuisance, and that his injury was the proximate result thereof. The right to recover upon the claim as thus made is put squarely in issue by the motion to direct a verdict. The doctrine is well settled that it is not negligence *per se* to establish, in nearby proximity to a public thoroughfare, a factory, shop, or other industrial plant, in the necessary and reasonable operation of which loud or discordant noises are produced. The demand of the present day conditions are such that the establishment and operation of such plants not only subserve the convenience of our people, but, in the larger part, they are matters of necessity. Thus in a recent case it is well said:

It certainly cannot be said to be *per se* negligence to erect and operate a sawmill within sixty feet of a county road.

If this be not true, then it would be hazardous to erect any manufacturing establishment on a highway or public street, because, if a horse should become frightened, and injure some one, then the owners or proprietors would be liable to damages therefor. * * * To hold that the erection of a sawmill or a manufacturing establishment near a public highway or street is *per se* negligence would be to circumscribe the business affairs of life, and retard the progress of the age. The usual noises which attend the operation of machinery in mills and manufacturing establishments situated on public highways and streets are such to which the traveling public must submit.

Goodin v. Fuson, 22 Ky. Law, 873 (60 S. W. Rep. 293). On the other hand, it is to be said that the traveling public is entitled to make free use of highways and streets, and an adjoining property owner has no right to so use his property as to interrupt or interfere with the exercise of such right by creating or maintaining conditions unnecessarily dangerous, either in the way of producing unusual noises calculated to frighten horses ordinarily tractable and subject to control, or otherwise. *Parker v. Union Woolen Co.*, 42 Conn. 402; *Smethurst v. Ind. Cong. Church*, 148 Mass. 263 (19 N. E. Rep. 387, 2 L. R. A. 695, 12 Am. St. Rep. 550); *Island Coal Co. v. Clemmitt*, 19 Ind. App. 21 (49 N. E. Rep. 38). Such, as we think, is also the doctrine of the cases cited and relied upon by counsel for appellant, wherein is involved the liability of a railway company for damages where a team becomes frightened and runs away as the result of the sudden noise incident to the escape of steam from a standing locomotive. *Louisville, etc., Ry. v. Schmidt*, 134 Ind. Sup. 16 (33 N. E. Rep. 774); *Scaggs v. Railway*, 145 N. Y. 201 (39 N. E. Rep. 716); *Howard v. Railway*, 156 Mass. 159 (30 N. E. Rep. 479).

The basic principle upon which the doctrine of all the cases is bottomed is found in the maxim old as the books — in substance, that no man shall make use of his own property in such manner as to unreasonably interfere with the en-

joyment on the part of others of the rights conferred upon them by law. Of necessity it follows that in each individual case the question must resolve itself to this: Was the use being made of the adjacent property such in character as to be an unnecessary interference with or unnecessarily dangerous to persons making lawful use of the street or highway? And whether or not improper use amounting to negligence has been made to appear in any given case is generally a question to be determined by the jury. Taking the facts as shown by the record in the instant case, we think it cannot be doubted but that the elevator was located at a place where it might properly be. So, too, as we think, the use of a gasoline engine in connection with the operation of such elevator was proper and lawful, and cannot therefore be said to have been *per se* negligent. The use of gasoline in the creation of motive power has become general throughout the country, not only in the operation of mills and factories, but as well for the purposes of locomotion, and there can be no grounds upon which to predicate at this time a holding that such use is in and of itself wrongful. As in the use of steam and electricity, it becomes wrongful only when the use is attended with negligence. Accepting such to be the law, there is no escape, in our view, from the conclusion that, under the facts disclosed, the question whether there was negligence in the matter of the use and operation of defendant's engine should have been submitted under proper instructions to the jury for a verdict.

III. Counsel for appellee make the point that a recovery must be denied to plaintiff in any event for that at the time of his accident he was not traveling a public street, but was on private grounds. We do not share in the view thus taken. The way was open and generally traveled, and this condition had existed for many years. We need not consider what was the character or extent of the rights acquired by the public. Certain it is that the use being made of the way was well known by all,

S. SAME.

and acquiesced in by the railway company and its tenants, including the defendant. Plaintiff was not a trespasser, therefore, and the fact of his use of the way can in no sense be said to have involved a want of proper care on his part. Other questions argued are not likely to arise upon a new trial.

For the error in taking the case from the jury and entering judgment against plaintiff upon an instructed verdict, the judgment must be reversed, and the cause remanded for a new trial.—*Reversed.*

Supplemental opinion on rehearing.

WEDNESDAY, FEBRUARY 15, 1905.

BISHOP, J.—Appellee has submitted a petition for rehearing, which, having been fully considered, we agree must be overruled. We think it proper to say, however, in explanation of the original opinion, and in view of a possible new trial, that we are not to be understood as holding that the law imposes upon one operating a gasoline engine the abstract duty of adopting any particular method of muffling the sound of the exhaust, or, for that matter, of employing any method whatsoever. The question is one of negligence, in any event; and, as bearing upon this, the method used, if any, and the sanction which has been made of such use in the practical experience of others, are matters material to be considered. From such consideration it follows, also, that the mere fact that a device adopted, and which proves ineffective, in the sense that it does not wholly destroy the sound of the exhaust, is not of itself sufficient to establish negligence.

Further, and in respect of the third subdivision of the original opinion, we are to be understood as holding merely that the evidence in the record before us is sufficient to establish the way upon which plaintiff was traveling as a public thoroughfare, and that plaintiff had the right to use the same as such. Accordingly we are not called upon to determine

what the rights of plaintiff might have been, had the record disclosed that his use of the way was that of a mere-licensee.

With these explanations, our former opinion is adhered to.

J. T. ANDERSON, Appellant, v. D. C. KYLE, ET AL., Appellees.

Homesteads: SALE ON EXECUTION: PREVIOUSLY CONTRACTED DEBTS.

A debt for which a homestead may be sold on execution under Code, section 2976, is one which has become a fixed obligation, subject to enforcement prior to the acquisition of the homestead. The evidence in this case fails to show an antecedent debt such as is contemplated by the statute.

Appeal from Washington District Court.—HON. BYRON W. PRESTON, Judge.

WEDNESDAY, FEBRUARY 15, 1905. .

ACTION in equity to subject certain real estate to the payment of a judgment rendered in favor of plaintiff and against the defendant D. C. Kyle and his wife, Joanna Kyle, the latter now deceased. Upon the trial the petition of plaintiff was dismissed, and there was judgment in favor of defendants for costs. Plaintiff appeals.—*Affirmed.*

Schuyler W. Livingston, for appellant.

S. W. & J. L. Brookhart, for appellees.

BISHOP, J.—In March, 1890, the defendant D. C. Kyle and his wife Joanna Kyle, sold to plaintiff a certain tract or parcel of land situated in the city of Washington, this State, and conveyed the same by warranty deed. Shortly thereafter plaintiff sold said land to one J. S. Adams, and conveyed to him by warranty deed. In the year 1896, the

children of D. C. Kyle brought suit against said Adams for partition of said lands, claiming to be the owners by inheritance of an undivided eight-ninths part thereof. As a result of such action, and by reason of proof of title in said partition claimants, plaintiff was compelled to, and did in October, 1896, pay to said Adams the sum of \$520. Thereupon D. C. Kyle and Joanna Kyle confessed judgment in favor of plaintiff for said sum of \$520, and such confession was properly made a matter of record. It appears that in March, 1895, defendant D. C. Kyle purchased the certain real estate which is now sought to be reached in this action by execution issued upon said judgment, and took title thereto in his own name. In March, 1896, he conveyed the same to his wife, and the latter died intestate, in January, 1900. At the time the property thus in question was purchased, the defendant D. C. Kyle, with his wife, and the other defendants, their children, went into occupancy thereof as a homestead, and it has been so claimed and occupied ever since.

The sole question in the case is whether the debt which was merged into the judgment by confession was one contracted prior to the acquisition of such homestead, and hence, in virtue of section 2976 of the Code, enforcement of the judgment may be had by sale of the property under execution. This question the court below answered in the negative, and, we think, correctly so. It is not claimed that any fraud entered into the sale and conveyance to plaintiff in 1890. The defendant D. C. Kyle and his wife acted upon the belief that they were possessed of title to the lands conveyed. So, too, the facts respecting the acquisition of the title to the property now claimed as a homestead involve no element of bad faith. We need not consider, therefore, what might have been the effect upon the situation had fraud been tendered as an issue and proved upon trial. Now, as Kyle and his wife were not in fact possessed of an indefeasible title to the lands conveyed to plaintiff, it may be conceded that a breach of the covenants in the deed occurred when de-

livery thereof was made. But plaintiff was given possession of the property at the time, and by the well-settled rule in this State the breach was to be regarded as a technical one only. He could not sue for or recover substantial damages until some positive injury had been suffered by him. *Foshay v. Shafer*, 116 Iowa, 302, and cases cited. The cases proceed upon the thought that no injury substantial in character can be said to have been sustained until the grantee has been evicted, or has been called upon to protect himself by making purchase of the outstanding paramount title. And not only this, but it would be manifestly unjust to permit a grantor to be charged in damages as of the value of the lands in advance of the establishment of an adverse and paramount right in a third person, especially as such might never be attempted. Accordingly it is said that the covenants of a deed are not breached so as to give rise to any obligation substantial in character, on the part of the grantee, until he has been compelled to give way in the face of the paramount title. *McClure v. Dee*, 115 Iowa, 546.

That a remote or contingent liability attaches to the execution and delivery of a deed in view of a possible failure of title is very true. But, as we have seen, the promise to repay or reimburse which arises out of a deed covenant has relation to the time when, if ever, such covenant shall be broken by eviction or otherwise. Such is quite a different thing from a specific debt contracted and agreed to be paid. And it is a debt contracted — that is, a fixed obligation, subject to enforcement by the processes of the law — that the statute authorizes to be satisfied by execution sale of a homestead. Our attention is called to the case of *Benge's Adm'r v. Bowling*, 21 Ky. Law 165 (51 S. W. Rep. 151), where a contrary conclusion seems to have been reached. An examination of the opinion discloses that the holding was made to depend upon the express provisions of the Kentucky statute, which includes all forms of liability as well as contract debts. As in this case no debt enforceable in law or in equity arose in

favor of plaintiff as against defendant D. C. Kyle until after he (plaintiff) had been called upon to reimburse his grantee, Adams, in the amount necessary to buy in the outstanding title, and, as this did not occur until long after the acquisition of the homestead in question, it becomes apparent that the court below rightly refused the relief demanded.—*Affirmed.*

WILLIARD CARVER, Appellant, v. SEEVERS & BRYAN, and
GEORGE W. SEEVERS.

Defaults: SETTING ASIDE: PRACTICE. Where time to file a substituted petition is given "until" a certain day, the day named will be excluded unless a contrary intention appears, and a default judgment taken upon a petition filed on the day so named will be set aside without the filing of an affidavit of merits and an answer.

Same. The order of the trial court in setting aside a default will not be disturbed on appeal unless a clear abuse of discretion is shown.

Appeal from Mahaska District Court.—HON. BYRON W. PRESTON, Judge.

WEDNESDAY, FEBRUARY 15, 1905.

APPEAL from an order setting aside a default.—*Affirmed.*

Williard Carver, for appellant.

John O. Malcolms for appellees.

SHERWIN, C. J.—A motion attacking the original petition was sustained, and the plaintiff was given leave to file a substituted petition, which he did. A motion to strike this petition was also sustained, and the plaintiff was given leave to plead further within five days. He did not comply with

the order, however, and the case stood without a petition for more than thirty days after the order was entered. He then, on the third day of April, 1903, asked and was granted until the first day of the next term to plead. The first day of such term was on the 7th day of April, and he filed no pleading before that day, but he did then file a substituted petition, without further leave or notice to the defendants. The last order giving him leave to file also gave the defendants ten days in which to plead thereto. The defendants found no pleading in the clerk's office on the 6th day of April, for there was none, and paid no further attention to the matter. On the 19th day of April the defendants' attorney who had sole charge of the case was excused from attendance on the court on account of sickness in his family. On the 5th day of May, which was a day of the April term, and while the defendants' attorney was still absent, and without further notice to the defendants, the plaintiff took a default, and secured a judgment against them. A motion to set the default aside was filed the next day, and, after the plaintiff had filed his resistance thereto and a hearing had been had, the motion was sustained and the default was set aside on the 8th day of June. We think there was no abuse of discretion in so doing. The application was made during the term, and was accompanied by an affidavit of merits which is practically conceded to have been sufficient, and we think the excuse offered was also sufficient. Indeed, the court may well have found that the default was improperly granted, for the reason that the second substituted petition was not filed before the 7th day of April. And such finding may have been fully justified by the history of the case. When time is given until a day named, "until" is ordinarily exclusive in its meaning, and will be so construed unless it be shown by the context or otherwise that the contrary was intended. *Century Dictionary*; *People v. Walker*, 17 N. Y. 502; *Kendall v. Kingsley*, 120 Mass., 94. And if the petition was not filed when it should

1. **DEFAULTS:**
setting aside;
practice.

have been the default was improperly granted, and an affidavit of merits and an answer were not necessary. *Beasley v. Cooper*, 42 Iowa, 542; *U. S. R. S. Co. v. Potter*, 48 Iowa, 65. But in any event the answer was in fact filed before the default was set aside, and it must be presumed that the court examined it and found it sufficient. It need not have been filed until after the default was set aside. *King v. Stewart*, 48 Iowa, 334. And it is sufficient, we think, if it be presented for the consideration of the court and counsel in connection with the affidavit of merits and motion.

Courts do and should favor the trial of causes on their merits, and this court will not interfere with the order of a trial court setting aside a default unless an abuse of discretion be conclusively shown. *Briggs v. Coffin*, 2. SAME. 91 Iowa, 329; *McQuade v. C., R. I. & P. Ry. Co.*, 78 Iowa, 688.

It does not appear in this case, and the order is therefore affirmed.

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| 126 | 671 |
| 134 | 741 |

R. KLAY, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, Appellant.

Railroads: KILLING OF STOCK: EVIDENCE. In an action against a
1 railway company for the killing of a steer, resulting as alleged
from a defective right-of-way fence, the evidence is reviewed
and held to support a finding that the animal was upon the
right-of-way and not upon the public crossing when killed.

Killing of stock: FAILURE TO FENCE: INSTRUCTION. In an action
2 for the killing of an animal claimed to have strayed upon defendant's right-of-way by reason of a defective fence, an instruction that plaintiff could only recover upon proof that the fence was out of repair which was known to defendant or which had existed for such a length of time that knowledge should be imputed to it, was as favorable as defendant was entitled to.

Location of accident: OBLITERATION OF EVIDENCE: INSTRUCTIONS.
3 Evidence that defendant's employes had worked the track between the time of the accident and the inspection of the track

by plaintiff, was admissible on the question of whether any evidences of the position of an animal when killed had been obliterated, and if so whether done purposely; also as bearing upon the credibility of the witnesses who did the work and who testified to the nonexistence of hoof prints.

Appeal from Sioux District Court.—HON. G. W. WAKARFIELD, Judge.

WEDNESDAY, FEBRUARY 15, 1905.

ACTION to recover the double value of a steer killed by a passing train on the right of way of defendant's railroad. Trial to a jury, and verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

J. C. Cook, H. Loomis, and J. H. Hutchinson, for appellant.

G. Klay, for appellee.

BISHOP, J.—The statute imposes upon a railway corporation failing to fence its track against live stock running at large a liability to the owner for the value of stock killed or injured by reason of the want of such fence, and a failure to pay within thirty days after notice accompanied by an affidavit makes the corporation liable for double the value of the stock thus killed or injured. Code, section 2055. In the instant case no question is made but that a steer, as described in the petition, and owned by plaintiff, was killed by being struck by a passing engine operated over defendant's line of railway. The controversy arises over the circumstances of the accident, and particularly as to the place where the animal was when struck and killed. It appears that the pasture in which the animal was generally kept adjoined defendant's right of way on the north; that to the west there was a north and south highway crossing the railway track. The animal was found, after being killed, about

one hundred and fifty feet east of the highway crossing. For the defendant there was the evidence of the engineer and fireman to the effect that as the engine came around a curve the steer was discovered in the highway and approaching the crossing; that it planted itself upon such crossing, and was there struck, and then carried along on the engine pilot to the point where, as stated, it was subsequently found. They alone were eyewitnesses of the accident.

Now, if this were all, the nonliability of the defendant would have to be conceded, as an accident thus occurring could in no sense be said to be the proximate result of a failure to fence. The evidence for plaintiff, however, made it appear that the steer was last seen before the accident in the pasture, and it is not claimed that the fence between such pasture and the highway fell short of the requirements of a lawful fence, or that it was in any way disturbed. The evidence further tended to show that the right of way fence was old and out of repair; being low in some places, and the wire being detached from the posts in other places. No tracks or other signs indicating that an animal had jumped over the fence or made its way through it were found, but there was some evidence of hoof prints in the gravel composing the track grade in the vicinity where the steer was found. The grade was about ten feet above the natural surface, and the steer, when found, was lying on the side of the grade, from two to four feet from the rail, and the only marks of injury upon it was a small quantity of blood that had oozed from the nose. It thus appears that the evidence for plaintiff was circumstantial in character, and the evidence for defendant that of persons claiming to be eyewitnesses. It is the argument of counsel for appellant that, in view of the record, the verdict has no sufficient support, and should not be allowed to stand. We cannot agree to this. In our view, the ultimate question was, after all, one for the jury. There was the defective fence to begin with. Then the jury may well

1. KILLING OF
STOCK: evi-
dence.

have found that, owing to the time of year and the dry weather, no tracks might be expected to be found. Moreover, it appears that the engine was running at about thirty miles an hour, and the jury may also have found that if the animal had been carried one hundred and fifty feet on the engine pilot, and then thrown off, it would have shown marks of injury, and would not have been dropped close beside the track. On the whole, the jury did conclude that the animal was upon the right of way when struck, and that the engineer and fireman were mistaken in their statement that the accident occurred on the crossing. We cannot say that the verdict was so far without reason that it should be disturbed.

II. Appellant claims that the jury was not properly instructed in respect of the requirements made upon it (said appellant) by law as to right of way fences, and complains

2. KILLING OF
STOCK: failure
to fence;
instruction.

of the refusal on the part of the court to give instructions as requested relating to that subject. There was no error. The question was whether or not the fence was in repair. The evidence for defendant tended to show it was in good repair. The evidence for plaintiff tended to show the contrary, and that such want of repair was of long standing. The court told the jury, in effect, that plaintiff could only recover upon proof that a want of repair was shown, and that such was known to defendant, or had existed for such a length of time that knowledge of its condition should be imputed. Defendant was entitled to no more.

III. It appears that, following the accident, the track employes of defendant engaged in work on and about the track at the place of the accident. Defendant asked an in-

3. LOCATION OF
ACCIDENT:
obliteration
of evidence;
instructions.

struction in substance directing the jury that such fact should not be considered as tending to discredit the evidence of defendant's witnesses, and that defendant's employes were under no obligation to leave the ground undisturbed for the inspection of the

plaintiff. The request was properly refused. The court, on its own motion, told the jury that "the defendant had a perfect right to work its track at the time the testimony shows its employes did work the same." The fact that the track had been worked between the time of the accident and the time of the inspection by plaintiff and his witnesses was a circumstance the jury was entitled to consider, and to give thereto such weight as, in their judgment, it was entitled to. At least, the testimony was proper in connection with the question whether any of the evidences as to the position of the animal when struck had been obliterated, and, if so, whether such work of obliteration was purposely done or otherwise. The evidence might also be considered in determining upon the credibility as witnesses of defendant's employes by whom the work was done, and who testified upon the trial to the nonexistence of any hoof prints upon the track.

On the whole, we think the defendant had a fair trial and the judgment is *affirmed*.

W. R. LACEY, ET AL., Appellees, v. JOHN E. DAVIS, ET AL.,
Appellants.

Temporary injunction: ACTION ON BOND. A right of action upon
1 a bond given for the issuance of a temporary writ of injunction, will not lie until the main action has been determined.

Arrest of judgment. Where a petition in an action on the bond for
2 damages for the wrongful issuance of a temporary injunction fails to state that the main action has been determined, a motion in arrest of judgment thereon, under Code, section 3758, will lie.

Appeal from Mahaska District Court.—HON. A. R. DEWEY,
Judge.

WEDNESDAY, FEBRUARY 15, 1905.

ACTION at law on an injunction bond to recover damages for the wrongful suing out of a writ of temporary injunction. The trial was had to the court, a jury being waived, and judgment entered in favor of plaintiffs. Defendants appeal.—*Reversed.*

Carver & Wooster, for appellants.

W. R. Lacey, B. W. Preston, W. W. Haskell, and *W. G. Jones*, for appellees.

BISHOP, J.—The petition in the instant action alleges that at a prior time named these defendants commenced an action in the Mahaska district court against one Boyer for an injunction; that in such action a temporary writ was prayed for, and the same was granted and did issue upon the filing of the bond here sued upon. It is then alleged that upon motion of said Boyer the temporary writ thus issued was dissolved. Damages consequent upon the wrongful issue of the writ are alleged, and it is said that the same and the claim therefor arise out of the fact that said Boyer was compelled to and did employ attorneys to procure the writ to be dissolved, and that the said Boyer thereby became obligated to pay the fees of such attorneys. It is then said that the claim thus arising in favor of said Boyer has been assigned in writing to this plaintiff; that such "attorney's fees are now due and payable, and the plaintiffs are entitled to recover the same from the said defendants." The defendants answered, denying that there had been any breach of the bond alleged, and denying that there was anything due upon the same. At the trial evidence addressed to the merits was offered and introduced by each of the parties, and at the close thereof, as shown by the record, this appears: "It is conceded that the case of *Davis v. Boyer* for injunction is still in this court for trial upon its merits." The court having announced as a conclusion that plaintiffs were

entitled to recover, the defendants thereupon filed a motion in arrest of judgment, the grounds therefor being stated: (1) The facts stated in the petition do not entitle plaintiffs to any relief. (2) The cause of action upon which plaintiffs' claim is based has not accrued, and their action is prematurely brought. This motion was overruled, and judgment was entered against defendants for the amount of plaintiffs' claim, with costs.

Undoubtedly it is the rule that a right of action does not accrue upon a bond given for the issuance of a temporary writ of injunction until the main action has been tried and determined. *Bank v. Gifford*, 65 Iowa, 648; *Bemis v. Gannett*, 8 Neb. 236; *Dowling v. Polack*, 18 Cal. 626; *Penny v. Holberg*, 53 Miss. 567; High on Injunctions, section 1649. The reasons for the rule are sufficiently set forth in the opinion in *Bank v. Gifford*.

The only question in the instant case, therefore, is whether the steps taken by the defendants were appropriate to avail themselves of the benefit of the fact thus conceded respecting the then pendency of the main action. We are of the opinion that such question must be answered in the affirmative. It will be observed that it is the allegation of the petition that the attorney's fees are due and payable. It may be assumed that such became due, as between Boyer and his attorneys, at once upon the services being performed. But the question made by the answer of the defendants in this case has relation to the damages arising in favor of Boyer as against these defendants, and it is to such claim for damage that the rule announced in *Bank v. Gifford* has application. Had the allegation been that the damages sustained by Boyer had become due and payable, there might have been ground to urge, in the absence of a motion for more specific statement, at least, that the petition was not subject to be assailed by motion in arrest; but such is not the case we are called upon to determine. A motion in arrest of judgment is allowable when the pleadings of the prevailing

party wholly fail to state a cause of action or defense. Code, section 3758. As the petition in this case did not state a cause of action, in that the material allegation that the main injunction suit had been tried or disposed of was lacking, it follows that the trial court erred in entering judgment against the defendants, and such judgment must be, and it is, *reversed*.

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| 126 | 678 |
| 132 | 719 |

W. H. LUCAS, Appellee, v. W. W. McDONALD & SON, Defendants, LEWIS & McFAUL, Interveners, Appellants, And one other case.

Transactions with decedents: QUALIFICATION OF WIFE AS WITNESS.

- 1 A wife is not disqualified by Code, section 4604, as a witness to a transaction and communication between her husband and a party since deceased, in which she took no part but was a mere spectator.

Sanity: NONEXPERT TESTIMONY. The continuation of a rational condition of the mind of one whose acts are put in question, may be shown by the abstract testimony of a nonexpert witness as to such person's sanity.

Appeal from Monona District Court.—HON. G. W. WAKEFIELD, Judge.

WEDNESDAY, FEBRUARY 15, 1905.

ACTION to recover upon certain certificates of bank deposit. In February, 1901, one Christian Jacobson was the owner and holder of the certificates in question, one calling for the sum of \$350, deposited by him, said Jacobson, in the bank of W. W. McDonald & Son, and the other calling for the sum of \$300, likewise deposited in the Mapleton Bank. It is the claim of plaintiff that on February 3, 1901, he became the owner of each of said certificates by transfer and delivery thereof to him by said Jacobson. Payment of said certificates having been refused on demand, these actions

were brought against the banks, each upon the respective certificate issued by it, to recover the amount thereof. Jacobson died, intestate, soon after the alleged transfer of the certificates to plaintiff, and Lewis & McFaul were appointed administrators of his estate. They intervened in each of these actions, and joined with the defendants in denying the ownership of plaintiff in the certificates, and alleging that at the time of the pretended transfer the said Jacobson was not of sound mind, and was physically and mentally incapable of making any valid disposition of his property. By agreement of parties the cases were tried jointly, and to a jury. There was a verdict and judgment in favor of plaintiff, and defendants and interveners appeal.—*Affirmed.*

Charles A. Dickson and J. W. Anderson, for appellants.

M. J. Sweeley and J. A. Pritchard, for appellee.

BISHOP, J.—I. Plaintiff called his wife as a witness, and she testified that Jacobson stayed at their house during his last illness, and was cared for by herself and husband.

Over objection made, she was permitted to
1. QUALIFICATION OF WIFE AS A WITNESS. testify that on February 3, 1901, Jacobson requested her to call her husband into the room, whereupon plaintiff was requested by Jacobson to go and get his vest out of his trunk, which being done Jacobson took the two certificates in suit out of his pocket, and handed them to plaintiff, saying to him: "I am not getting better. I give you these certificates for your own. I can never do enough for you folks for what you have done for me. I am well fixed, and have no relatives, and you have been children to me, and taken care of me." She also testified that Jacobson said something about signing the certificates, and tried to write on a tablet, to see if he could, but that her husband told him to be quiet, and he could do that afterward; that her husband took the certificates. Appellants insist that

under the provisions of section 4604 of the Code the witness was incompetent to so testify. That section provides, in substance, that no party to an action, or the wife of such party, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, as against the administrator of such deceased person. But the record discloses that here the transaction and communication was wholly between Jacobson and plaintiff. It does not appear that the wife had any part therein. She was therefore a competent witness. *Johnson v. Johnson*, 52 Iowa, 586; *Erusha v. Tomash*, 98 Iowa, 510.

II. The wife of plaintiff and one Nolan were allowed to testify abstractly, and over objection, that at the time of the alleged gift Jacobson was rational. Appellants complain of this as error, and it is the argument that each witness should have been limited to an opinion based upon facts testified to by such witness. Where unsoundness of mind is sought to be established by nonexpert witnesses, the rule invoked by appellant undoubtedly applies. But not so when proof is sought to be made of a continuation of normal or rational conditions. *Hull v. Hull*, 117 Iowa, 738.

III. Complaint is made to the effect that some of the jurors drank intoxicating liquors while in the jury room. We have read the showing made, and, without going into details, we conclude that there was no prejudice.

The verdict had support in the evidence, and the judgment is *affirmed*.

THOMAS MARTIN V. CITY OF OSKALOOSA, Appellant, And
two other cases.

Special assessments: ORDINANCES. Where an ordinance authorizing an assessment of abutting property to pay street improve-

126 680
e127 565

126 680
e133 585

126 680
136 485

126 680
137 110

ments is wholly void, and no valid reassessment thereby ordered can be made, a subsequent ordinance providing a legal method will not sustain the prior proceedings.

Ordinances: WHEN REQUIRED. Where the statute requires an ordinance for the exercise of a power conferred upon a city, the proceedings of the city without the ordinance are void.

Same. Although the statutes may not specifically require an ordinance for the exercise of a delegated power, yet if the statute is not specific as to the method, an ordinance may be necessary, and when enacted must be pursued.

Same. Generally the authority providing for an exercise of a power granted to a city by the legislature should be by ordinance rather than by resolution, but where the council is required by the statute or a general ordinance to act simply by a vote or otherwise, a resolution is sufficient.

Cities: POWER TO LEVY SPECIAL ASSESSMENTS. Where a statute conferring upon a city the power to make special assessments for improvement purposes points out the method to be pursued, the adoption of an ordinance for that purpose is not necessary. Under this rule a city had power to assess the cost of street improvements to abutting property pursuant to statutory provisions substantially as contained in chapter seven, title five, of the Code, and the validity of the ordinance under which it purported to act was immaterial except so far as inconsistent with the statute.

Codification: STATUTORY CONSTRUCTION. A general recodification and re-enactment of the statute law does not indicate a legislative intent to change the same, and the decisions relating to statutory provisions then in force will continue controlling in the interpretation of the same provisions; but where it is the plain legislative intent to radically change or materially add to the previous statutes, such decisions are not controlling.

Reassessments. Where a city had authority to levy a special assessment, it may make a reassessment because of an irregularity, under Code, section 836.

Appeal from Mahaska District Court.—HON. JOHN T. SCOTT, Judge.

WEDNESDAY, FEBRUARY 15, 1905.

THREE several appeals from the action of the city council of the city of Oskaloosa in levying special assessments for

street improvements, taken by property owners to the district court. The causes were tried together, and decrees rendered in favor of the appealing property owners. From these decrees the city prosecutes the present appeal.— *Reversed*.

Bolton & McCoy and *C. C. Orvis* (*W. H. Bremner* and *Read & Read*, on the brief), for appellant.

Gleason & Preston (*N. T. Guernsey*, on the brief, and *Zink & Roseberry*, by separate brief), for appellees.

MCCLAINE, J.— As these cases are now presented to us — an opinion written on a former hearing having been withdrawn on petition for rehearing — the issue involved is simple, although the arguments have taken a great range, and properly so, as we are asked to pass upon a question substantially new with us, and on which the decisions of other States throw light only by way of illustration. We shall confine ourselves, however, to the announcement of the conclusions reached with reference to the very case presented, and avoid elaboration as to many matters which have properly been urged in argument and fully considered, but which need not be passed upon, in view of the grounds on which this opinion is based.

The essential facts are that in May, 1901, the city council of Oskaloosa, by a "resolution of necessity," ordered the paving of a street in front of the premises of these three plaintiffs; making provision as to the material to be used, and manner of construction, and that the cost be "assessed against the abutting properties, as provided by law, except the intersections of said street, which shall be paid out of the improvement fund." At this time the ordinance regulating street improvements was No. 166 of the ordinances of the city which had been passed in 1896. Section 4 thereof provided for the levying of such assessments by the front-foot rule. This method of levying assessments had, however, been

in the meantime abrogated by statute, and another substituted. Acts Twenty-eighth General Assembly, page 14, chapter 29. It is conceded that at that time the assessment could not be made in accordance with section 4 of Ordinance No. 166. An assessment was, however, made on these property owners December 3, 1901, which subsequently, on appeal to the district court, was set aside as invalid, because made under the front-foot rule, and a reassessment was made January 21, 1902, in accordance with the statutory method of apportioning the costs of street improvements, and after the passage of a new ordinance (No. 223) on December 23, 1901, which repealed section 4 of Ordinance No. 166, and specifically authorized assessments to be made in accordance with the statutory method. The district court held the reassessment to be invalid, and it is with reference to this action only that the city is now asking relief in this court.

The substantial contention for the property owners is that Ordinance No. 166 had become void by reason of the enactment of the statute in effect annulling section 4 thereof; that, without a valid ordinance, no steps could be taken looking to an assessment; and that, as the assessment was entirely without authority of law, no reassessment could be made. For the city it is contended, first, that no ordinance was necessary to authorize the city to act in accordance with the provisions of the statute; second, that, although section 4 of Ordinance No. 166 had been invalidated, the remainder of the ordinance was in force, and effectual to authorize the city to proceed in ordering an improvement to be made, the cost of which could be assessed to the property owners; and, third, that whatever invalidity or irregularity may have existed in the proceedings prior to the reassessment, they were not such as to prevent the city from making a valid reassessment of the improvement to the property owners.

It may be conceded, as a preliminary proposition, that if an ordinance was necessary to authorize the city to order

the improvement to be made, and if Ordinance No. 166 was entirely invalid in all its parts and for every purpose, then the whole proceeding was illegal and without authority and no valid reassessment for the improvement thus ordered could be made, and that the subsequent passage of Ordinance No. 223, providing a valid method of assessment, would not sustain the prior proceedings. *Conn. Mut. L. Ins. Co. v. Chicago*, 185 Ill. 148 (56 N. E. Rep. 1071); *East St. Louis v. Albrecht*, 150 Ill. 506 (37 N. E. Rep. 934); *Newman v. Emporia*, 32 Kan. 461 (4 Pac. Rep. 815); *Wace v. Prather*, 90 Tex. Civ. App. 80 (35 S. W. Rep. 958); *Buckley v. Tacoma*, 9 Wash. 269 (37 Pac. Rep. 441); *Crawford v. Mason*, 123 Iowa, 301; *Allen v. Davenport*, 107 Iowa, 90.

If the statute provides that the city shall exercise by general ordinance the power conferred upon it, such an ordinance is essential before the city can act, and without it the proceedings of the city in attempting to exercise the power conferred will be invalid. *Zelie v. Webster City*, 94 Iowa, 393; *Kepple v. Keokuk*, 61 Iowa, 653; *McManus v. Hornaday*, 99 Iowa, 507. And where the city exercises its power under and by virtue of an ordinance, the method prescribed by the ordinance must be pursued. *Burget v. Greenfield*, 120 Iowa, 432.

Even though the statute conferring power upon a city does not specifically direct that such power shall be exercised by means of and in accordance with, a general ordinance, an ordinance may be necessary, if the statute is not specific as to the methods to be adopted in carrying out the power granted. *Muscatine v. Keokuk N. L. P. Co.*, 45 Iowa, 185; *Eckert v. Town of Walnut*, 117 Iowa, 629; *People v. Village of Crotty*, 93 Ill. 180; *Cascaden v. Waterloo*, 106 Iowa, 673.

There is, perhaps, some discrepancy in the authorities as to whether, in this class of cases, an ordinance is essential,

1. SPECIAL ASSESSMENTS: ordinances.

2. ORDINANCES: when required.

8. SAME.

or whether, on the other hand, the power may be exercised by resolution, although this matter will be found

4. SAME

to depend, no doubt, on the language of the statutes in the different States. Under our statutory provisions, it may perhaps very properly be said that the general authority to provide how a power conferred by the Legislature shall be exercised should be by ordinance, rather than by resolution. See Code, sections 680-684. *Shelby v. Burlington*, 125 Iowa, 343. But where it is simply required that the council shall act by vote or otherwise, in the specific case, in accordance with a method pointed out by statute or by general ordinance, a resolution is, no doubt, sufficient. *Santa Cruz Rock Pavement Co. v. Heaton*, 105 Cal. 162 (38 Pac. Rep. 693); *Atchison Board of Education v. De Kay*, 148 U. S. 591 (13 Sup. Ct. 706, 37 L. Ed. 573); *National Tube-works Co. v. Chamberlain*, 5 Dak. 54 (37 N. W. Rep. 761); *Ashton v. Ellsworth*, 48 Ill. 299.

on the other, as to make the cases relied upon controlling.

But we do not regard the distinction between ordinance and resolution as material in this case. If a general ordinance was necessary, and Ordinance No. 166 was invalid, then the attempt by the city to proceed by means of a resolution in the particular case was without authority, and the proceedings were void.

We are of the opinion, however, that no general ordinance was essential to enable the city to order the improvement, and take the steps necessary to a valid assessment.

5. CITIES: power to levy special assessments. It certainly cannot be true that where the entire procedure is regulated by statute, and nothing is left to be determined by general ordinance, the city can derive any greater authority from an ordinance which simply re-enacts the provisions of the statute. All that can be essential in such a case is that the city take the steps provided by the statute, and, if these steps are taken as required, the assessment will certainly be valid. Counsel

have cited authorities to the proposition which they claim to be analogous, that a constitutional provision is not self-executing, and is of no force as conferring authority until it is put into effect by suitable statutory enactments. We need not discuss these cases, for the analogy, if any, is with the class of cases where the statute confers upon the city general authority, but leaves the method of procedure to be determined by ordinance. It can hardly be said that a constitutional provision — even one conferring power — cannot possibly take effect, no matter how specific it may be, until statutes have been enacted for the exercise of the power thus granted. But there is no such analogy between a constitutional provision and the powers to be exercised thereunder, on the one hand, and a statute conferring power upon a city, on the other, as to make the cases relied upon controlling. The full and plenary power of the Legislature to confer authority upon a municipal corporation, and to direct the method of its exercise, cannot be questioned; and if we find that the Legislature has conferred upon cities such as the defendant the power to order street improvements to be made, and to proceed in a prescribed method in making the improvements, assessing the cost upon abutting property owners, then there can be no question, in our judgment, that if the defendant pursued the method prescribed, and took the steps required, the assessments are valid. We turn, then, to the statutory provisions relating to street improvements and special assessments therefor, to ascertain whether there are such specific provisions taking effect without further action in the way of general regulation by the city, and whether the city has taken the essential steps to support an assessment under such provisions.

It may be conceded that, under the general statutory authority conferred upon cities in the Code of 1873, no proceeding for the making of street improvements and levying assessments upon abutting property could be instituted, except in pursuance of some general ordinance prescribing the

method of procedure to be followed. But, between the enactment of the Code of 1873 and the general revision of the statutes of the State, made in the enactment of the Code of 1897, many statutes were passed, prescribing specifically the method to be pursued in exercising these powers. And when the Legislature recodified the law relating to municipal corporations in the Code of 1897, it retained many of the general provisions of the Code of 1873, but embodied in separate chapters of title 5, relating to "City and Town Government," much of the specific legislation which had already been adopted. Chapter 7 of that title contains these specific provisions, the heading of the chapter indicating that it relates to "Street Improvements, Sewers, and Special Assessments."

And herè it may be said, in order to answer an argument elaborated by counsel, that while a general codification and re-enactment of the law does not indicate any legislative purpose to change the law, and the decisions relating to statutory provisions previously in force are still to be considered as controlling in the interpretation of the same provisions found in the codification thereof, nevertheless, if the plain intention of the Legislature is to radically change or materially add to the previous statutory provisions, the decisions of the courts as to prior statutes ought not to be regarded as binding in the interpretation of such provisions as are new or fundamentally changed. To illustrate this view, we may compare the provisions of Code, section 751, which gives cities the general power to "establish, lay off, open, widen, straighten, narrow, vacate, extend, improve and repair streets," etc., which is substantially retained from the Code of 1873, with the specific provisions of chapter 7, based on legislation adopted subsequently to the Code of 1873, amplifying the general power to improve streets, and providing how the improvement shall be made, for the purpose of assessing the cost on abutting property. Undoubtedly, any power attempted to be exercised with reference to street improvements under Code,

6. CODIFICATION:
statutory
construction.

section 751, must be exercised by means of a general ordinance, for neither that section, nor the sections following it in the same chapter, make any provision as to the method of exercising the power. But so far as the power is conferred by chapter 7, the method is specifically prescribed.

Considering in greater detail the provisions of chapter 7, we find that in section 792 cities are given power to improve any street, and to assess the cost on abutting property, "as provided in this chapter." By section 793 it is required that the construction of such an improvement shall not be ordered made, except by a three-fourths vote of all the members of the council, unless petitioned for by the owners of the majority of the linear front feet of the abutting property. By section 810 a proposed resolution declaring the necessity or advisability of the improvement, the kind of material proposed to be used, and the method of construction, is required, with notice, etc. And by section 811 the council is authorized by ordinance or resolution to order the making of the improvement proposed in the preliminary resolution. Subsequent sections provide specifically as to the contract for the improvement, bids, contractors' bonds, and the lien of the proposed assessment. In section 818 it is provided that the cost of making any street improvement "authorized in this chapter," except so far as the same involves the expense of improvement at street intersections, and the cost which may be assessed to street railways, "shall be assessed as a special tax against the property abutting" on the streets improved. And by sections 820-825 specific provision is made as to how the cost is to be ascertained, and the assessments to abutting property owners made. We cannot discover that anything is left to be provided for by general ordinance, nor that Ordinance No. 166 of defendant city contains any essential provisions not found in the Code. We therefore reach the conclusion that it is immaterial whether that entire ordinance was rendered invalid by the statutory abrogation of section 4 thereof, or whether it re-

mained in full force, save so far as it was inconsistent with the provisions of the Code; nor do we find that the new ordinance (No. 223) enacted after the improvement was ordered and constructed, but prior to the reassessment of the cost of the improvement to the property owners, contains any essential provisions not already in force in the defendant city as a part of the general law. Had the city proceeded in accordance with the general law to make the assessment for the costs of the improvement ordered in the resolution of necessity already referred to, such assessment would, in our judgment, have been valid.

But as it is conceded that the assessment first made was invalid, because made under section 4 of Ordinance No. 166, we reach the question whether the city had authority to

7. REASSESS-
MENTS.

reassess the costs to property owners under Code, section 836, which provides that, "when by reason of nonconformity to any law or ordinance, or by reason of any omission, informality or irregularity, any special tax or assessment hereafter levied is invalid or is adjudged illegal * * * the council shall have the power to correct the same by resolution or ordinance, and may reassess or levy the same * * * with the same force and effect as if done at the proper time, in the proper amount, and in the manner provided by law or by the resolution or ordinance relating thereto." This section has been held valid and applicable where the kind of material to be used was not determined in advance. *Tuttle v. Polk*, 84 Iowa, 12, and 92 Iowa, 433. And in several cases it has been said that irregularities and defects in the proceedings might be thus cured. *Clinton v. Walliker*, 98 Iowa, 655; *Windsor v. Des Moines*, 101 Iowa, 343; *Ottumwa Brick & Const. Co. v. Ainley*, 109 Iowa, 386; *Gill v. Patton*, 118 Iowa, 88. And see *Freeport Street R. Co. v. Freeport*, 151 Ill. 451 (38 N. E. Rep. 137); *Baltimore v. Ulman*, 79 Md. 469 (30 Atl. Rep. 43).

The conclusion already indicated as to the validity of the steps taken by the defendant city, without regard to

whether the existing general ordinance was in force, leaves no difficulty in the way of sustaining the reassessment. So far as is pointed out, the only obstacle to the enforcement of the first assessment was that it had been "adjudged illegal," within the language of section 836, because made by the front-foot rule; and, without inquiring into the correctness of the decision as to its illegality, we find that a legal assessment might have been made, and therefore the reassessment was authorized.

The cases relied on by counsel for appellee are those in which some essential authority or step in the proceedings was wanting, as in *Zalesky v. Cedar Rapids*, 118 Iowa, 714, and *Allen v. Davenport* (C. C. A.) 132 Fed. 208. The view which we have taken with reference to the existence of the authority on the part of the city to order the improvement, and the taking of the essential steps to authorize an assessment, renders it unnecessary to discuss these and other cases which are relied upon by counsel. They do not call attention to any omission of the essential steps which the statute provides for, and the record shows, directly or by implication, all that is required for a valid assessment. We can presume that there was ample notice of the reassessment, for it appears from the records of the council that a resolution for a reassessment was passed January 6, 1902; that objection to the reassessment on the part of the plaintiffs in these cases was made to the council on the 31st of the same month; and that thereupon the council passed a resolution making the reassessment.

We reach the conclusion that the reassessments were valid, and that the decrees of the lower court in favor of plaintiffs were erroneous. They are therefore *reversed*.

LORENE C. DIVER, Appellant, v. KEOKUK SAVINGS BANK,
CITY OF KEOKUK, KEOKUK CONSTRUCTION CO., E. P.
McMANUS, and GEORGE S. TUCKER, Appellees.

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| 126 | 691 |
| 127 | 472 |
| 126 | 691 |
| 128 | 86 |
| 123 | 691 |
| 138 | 85 |

Special assessments: NOTICE: REPEAL OF STATUTES. The repeal of

- 1 a statute by implication is not favored in law, and where two statutes covering in whole or in part the same subject are not absolutely irreconcilable and a purpose of repeal is not clearly expressed or indicated, effect if possible will be given to both. Under this rule, Code, section 971, relative to notices in cases of special assessments is not repealed and section 823 substituted therefor by chapter 29, Acts Twenty-eighth General Assembly, but the former is applicable to cities under special charter, and the latter to cities organized under the general law.

Validity of municipal improvement contracts. The provisions of a

- 2 paving contract requiring the contractor to pay all damage arising from the work; to leave all permanent streets, walks and alleys in as good condition as when found; to indemnify the city against claims arising from injury to person or property on account of the work; to pay all injury to water, gas and sewer pipes; and to keep the pavement in repair for one year, do not invalidate the contract.

Same. The provisions of a paving contract limiting the con-

- 3 tractor's right in the employment of help and purchase of material are invalid, but a property owner who made no objection to the same until after the work was done and the benefit accrued cannot complain thereof, where it affirmatively appears that the cost of the work was not thereby increased.

Paving contract: VALIDITY: INTEREST OF COUNCILMAN. After a

- 4 municipal improvement has been made and accepted by the city, a taxpayer, in the absence of actual fraud, cannot resist payment therefor because of a violation of Code, section 943, prohibiting a member of the council from being interested in any contract for such work.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTHE, Judge.

TUESDAY, FEBRUARY 14, 1905.

ACTION in equity to enjoin and restrain the collection of certain assessment certificates issued by the defendant city for certain street improvements adjacent to plaintiff's property. The trial court dismissed the petition, and plaintiff appeals.— *Affirmed.*

F. M. Ballinger and *William Timberman*, for appellant.

H. R. Collins and *Hughes & Sawyer*, for appellees.

DEEMER, J.— Plaintiff is the owner of certain property in the city of Keokuk. In September of the year 1902 a resolution was introduced before the city council of that city for the paving and curbing of a street and alley in front of, and abutting on, plaintiff's property. On October 6th of the same year this resolution was passed by a vote of nine to three; defendant Tucker, who was an alderman, voting in the affirmative. The city engineer was thereupon directed to prepare and file a plat and estimate of the cost of the improvement, and the city clerk was ordered to publish notice of the intention of the city council to make the improvement. The engineer filed his plat, and estimated the cost of the improvement of the alley to be \$1,080, and of the street to be \$7,050. The notice of intention was duly published as required by section 965 of the Code. On November 3d a resolution ordering the paving, etc., and directing the engineer to advertise for bids, was passed by a vote of ten to two; Tucker also voting in favor thereof. Notice to contractors for bids was duly published, and, pursuant thereto, two bids were filed — one by Cameron & McManus, aggregating \$8,603, and the other by the Keokuk Construction Company, a partnership composed of McManus and defendant Tucker, aggregating \$7,537. The bid of the Keokuk Construction Company, being the lowest, was accepted, and by resolution the contract was awarded to it. The vote on this resolution was unanimous; Tucker not voting, however.

Work was commenced in March, 1903. The city employed an inspector, who supervised the work, and the improvement was completed, and accepted by the city, within the time provided for by the contract. A resolution was thereupon passed for the assessment of the cost thereof against the property abutting thereon, and the city clerk was directed to give notice thereof as required by law. The vote on this was unanimous, Tucker voting therefor. Notice of the proposed assessment was duly published as required by section 971 of the Code. No objections having been filed to the proposed assessments, they were confirmed by unanimous vote of the council on the 6th day of July, 1903; Tucker voting therefor. Certificates were thereupon issued to the construction company, which in turn, assigned those against plaintiff's property to the Keokuk Savings Bank. The total of the assessments against plaintiff's property was \$367.86. Plaintiff and her husband, who was her agent, knew that the improvement was being made by the city, had constructive notice of all that the published notices imparted, and, we are satisfied from the evidence, knew that it was proposed to assess the cost thereof against her property from the beginning. Neither she nor her husband made any objections thereto until about the time this suit was commenced, which was in August of the year 1903.

The plans and specifications for the improvement, as well as the contract itself, required the contractor to sustain all loss or damage arising out of the nature of the work to be done, and required him to keep the pavement in repair for the period of one year, to keep and employ on the work only citizens and residents of the city of Keokuk, and to purchase all materials of Keokuk manufacturers or Keokuk merchants, so far as practicable. He was also required to leave in as good condition as when found all pavements, sidewalks, and improvements along the line of the street to be paved.

Plaintiff contends that the entire proceedings were irregular, void, and of no effect, in that, first, the city did not

give the notice required by section 823 of the Code; second, the contract is void because of the special provisions therein to which we have just called attention; and, third, the original resolution and all proceedings thereunder are void because of the conduct and vote of Alderman Tucker, who was one of the partners in the construction company to which the contract was let, and was directly interested in the work to be performed.

There is some contention between counsel as to the right of plaintiff to bring an action to enjoin the collection of these assessment certificates; but we take it that if the proceedings were wholly void, for want of notice or for any other reason, and not simply irregular, the action will lie. *Gallaher v. Garland*, 126 Iowa, 206.

I. The first proposition presented is the sufficiency of the notices given by the city. Keokuk is acting under a special charter, and it is admitted that it religiously followed the provisions of sections 965 to 979, inclusive, of the Code, which provide a complete scheme for street improvements in such cities. It gave all the notices therein required, and no fault is found with its procedure thereunder, save that plaintiff contends that section 971 was either expressly or impliedly repealed by chapter 29, page 14, Acts Twenty-eighth General Assembly, and that section 823 of the Code was the only one in existence relating to notice after the filing of the plat and schedule for the reassessment. Section 971 reads as follows:

1. SPECIAL AS-
SESSMENTS:
notice; re-
peal of stat-
utes.

After filing the plat and schedule referred to in section 820, chapter 7, of this title, the council shall direct the clerk or recorder to give ten days' notice by publishing same three times in a newspaper published in said city, that such plat and schedule are on file in the office of the clerk, fixing a time within which all objections thereto or to the prior proceedings must be made in writing, and the council having heard the objections and made the necessary corrections shall levy the special assessments as shown in such plat and schedule.

Section 823 reads in this wise:

After filing the plat and schedule, the council shall give notice by two publications in each of two newspapers published in the city if there be that number, otherwise in one, and by hand bills posted in conspicuous places along the line of such street improvement or sewer. That said plat or schedule are on file in the office of the clerk, and that within twenty (20) days after the first publication of all objections thereto, or to the prior proceedings, on account of errors, irregularities or inequalities, must be made in writing and filed with the clerk; and the council having heard such objections and made the necessary corrections, shall then make the special assessment as shown in said plat and schedule as corrected and approved.

This latter section, when originally adopted, was not intended to apply to special charter cities, but only to those acting under the general incorporation law. But the Twenty-Eighth General Assembly passed an act (page 14, chapter 29) relating to the levy and collection of special assessments, which it is claimed repealed section 971, and substituted 823 in place thereof. If this be true, it follows that the city did not comply with the law, and perhaps had no jurisdiction to make the assessment. This chapter 29 was evidently passed to meet the decision of the United States Supreme Court in *Norwood v. Baker*, 19 Sup. Ct. 187 (43 L. Ed. 443) and provides for assessments according to benefits, and that they shall at no time exceed twenty-five per cent. of the actual value of the property assessed. It also provides for the payment of the deficiency, if any there shall be, out of the general funds of the city. Further provision is made for the payment in like manner of the cost of an improvement in front of property against which no special assessment can be made. Section 3 of the act provides that, so far as applicable, section 823 of the Code, and other sections (naming them), should govern special assessments in all cities, including those acting under special

charters, "unless otherwise specially provided." It also provided that upon appeal the court should determine the question of benefits to the property assessed.

There was no express repeal of any section of the Code, and, if there be a repeal, it must be held to result from implication. Such repeals are not favored in law; and when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, no purpose of repeal being clearly expressed or indicated, it is the duty of a court, if possible, to give effect to both. It will not be presumed that the Legislature intended a repeal of a prior statute by a later one on the same subject, unless the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute. *Casey v. Harned*, 5 Iowa, 1; *Sherman v. Des Moines*, 100 Iowa, 88; *Cole v. Supervisors*, 11 Iowa, 552; *State v. Shaw*, 28 Iowa, 67; *Lambe v. McCormick*, 116 Iowa, 169; *Phillips v. City*, 63 Iowa, 578; *Arnold v. City*, 85 Iowa, 441. Prior to the enactment of this chapter, there were two complete schemes for the improvement of public streets and alleys — one for cities acting under the general incorporation laws, and the other for cities acting under special charters. The act referred to is by its terms made applicable to special charter cities, and doubtless section 823 might have been made applicable thereto. Indeed, we should be inclined to hold that it was, but for this significant expression found in section 3 of the act: "Unless otherwise specially provided." We are not justified in reading these words out of the statute, and must give them significance, if it is possible to do so on any reasonable and consistent theory. There is, as it seems to us, a perfectly reasonable and plausible explanation thereof. As already observed, there were two complete schemes for street improvements like that in question, and two only; one relating to cities in general, and the other to special charter cities. In one, section 823, relating to notice, was found;

and in the other, section 971, relating to the same subject. Section 3, page 15, chapter 29, Acts Twenty-Eighth General Assembly, provides in effect, that section 823 shall not apply when the matter covered thereby is otherwise specially provided for. This last clause could only have reference to the notice provided in such cases for special charter cities. In those cities notice after the filing of the plat and schedule was specially provided for in section 971. So that section 823 does not apply. This holding gives effect to every word in either of the statutes, and has the merit of avoiding a repeal by implication, which, as we have already seen, should be avoided. Section 823 then relates to notice in cities acting under the general law, and section 971 to those acting under special charters.

Claim is made that, if this be true, there was no need for section 3 of chapter 29. This same argument would also apply to the other sections named. We apprehend that the section found its way into the act by reason of a desire on the part of the Legislature to avoid trenching upon the general scheme of public improvement in its effort to provide for assessment according to benefits, instead of by the front-foot rule, to meet the apparent holding of the Supreme Court of the United States in the *Norwood Case*, *supra*. Like many other sections found in our laws, it was introduced as a safety clause, and not for the purpose of changing existing laws any further than was necessary to accomplish the object then in hand. But in so doing the Legislature in this instance also clearly evinced an intent not to disturb other special provisions relating to the same subject. This it did by the use of the words already referred to. Remembering that all legislation with reference to special charter cities is, in a sense, special, and applicable to them alone, we think we can see a reason for the introduction of the exception. This is the only possible occasion for the use of the language so many times quoted, and, remembering our duty in the premises, we must hold, as already indicated, that section

971 has not been repealed, and that the notice given in this case of the proposed assessment was sufficient.

II. Coming now to the next point, the alleged invalidity of the contract by reason of some of its provisions, we have a different inquiry — one based on an entirely distinct premise. These objections go to the validity or legality of the contract. The first, to

2. VALIDITY OF
MUNICIPAL
IMPROVEMENT
CONTRACTS.

that part of the contract requiring the contractor to meet all loss or damage arising out of the nature of the work done, and to repair or replace, and leave in as good a condition as when found, all permanent sidewalks, streets, alleys, etc., is entirely without merit. These simply imposed a duty already implied as of law, and added nothing to the contractor's obligations. There are also two other provisions of the same general character, which should be treated in the same way. One was for indemnity to the city from all suits or claims growing out of injury or damage to person or property by reason of the work to be done, and the other obligating the contractor to pay for all injuries done to water, gas, or sewer pipes. The other objections have already been disposed of by prior decisions of this court. Thus in *Osburn v. Lyons*, 104 Iowa, 160, and *Allen v. Davenport*, 107 Iowa, 90, we held that a stipulation requiring the contractor to keep the pavement in repair for the space of one year did not invalidate the contract. It was there treated as in the nature of a guaranty or warranty of the quality of work. There are cases holding to a contrary doctrine, but we are satisfied with our rule, and are not inclined to depart from it now. Appellant attempts to distinguish these cases, but, in our judgment, they are not distinguishable. The repairs contemplated were evidently those caused either by defective workmanship or material. A pavement which needed repair in one year would surely be defective. See, also, on this point, and as sustaining our rule, *Cole v. People*, 161 Ill. 16 (43 N. E. 607); *Robertson*

v. Omaha, 55 Neb. 718 (76 N. W. 442; 44 L. R. A. 534); *Latham v. Wilmette*, 168 Ill. 153 (48 N. E. 311).

The provisions as to what laborers should be hired, and as to where material should be purchased, were, no doubt, invalid. But the evidence affirmatively shows that they did

not in any manner increase the cost price of the work. This being true, the plaintiff having made no objection to the contract until after the work was done, she is in no position, after having received the benefits of the contract, to object thereto. *E. & W. Co. v. Jasper Co.*, 117 Iowa, 369; *Chadwick v. Kelly*, 187 U. S. 540 (23 Sup. Ct. 175, 47 L. Ed. 293); *Treat v. People*, 195 Ill. 196 (62 N. E. 891). There are other reasons why these objections should not be allowed to prevail. At most, they made the contract voidable, and not void. Plaintiff did not appear, in response to the notices, to file objections either to the proposed improvement, the contract therefor, or to the assessment. Having failed to do so, as she might have done, under the statute, she cannot now be heard to complain. In most if not all of the cases relied upon by appellant, objections were lodged at a proper time — while the contract was executory, and before any benefits had accrued thereunder, or any expenditures made. As the contract was, at most, merely voidable, plaintiff was bound to make her objections at a proper time, and she could not wait until after the work was done, and then come into a court of equity and attempt to avoid payment for the same. This is fundamental doctrine, sustained by the following among other cases: *Minneapolis, etc., v. Lindquist*, 119 Iowa, 144; *Ferguson v. Board*, 119 Iowa, 338; *Johnson v. Kessler*, 76 Iowa, 411; *Crawford v. Polk Co.*, 112 Iowa, 118; *Marion Co. v. Marion*, 121 Iowa, 306. Appellant says that she did not know the city proposed to assess the cost of the work, or any part thereof, against her property, but this claim is distinctively negated by the testimony.

III. Section 943 of the Code provides that no member

of the city council shall be interested, directly or indirectly, in any contract for work or services to be performed by the corporation. No specific penalties are provided for violation of this section, nor is it declared what effect such violation shall have upon the prohibited contracts. It is clearly shown that Tucker was a member of the council when this work was ordered, and when it was done. All the propositions, however, were carried by the necessary vote after rejecting the one cast by Tucker, so that the proceedings themselves were not affected by his vote. It is the contract alone which is affected by the section referred to. Tucker was directly interested in the work to be done, through his connection with the Keokuk Construction Company. There is some claim here of actual fraud in the organization of this company; that is to say, it is contended that this name was taken by the firm of which he was a member for the purpose of concealing his interest in the transaction, but this is not borne out by the evidence. There was no actual fraud in the transaction. What was done in this connection may readily be accounted for, in the light of the testimony, on the theory of honesty of purpose, and we are not justified in such cases in inferring fraud. So that we have the simple question, what effect shall be given this section, in its bearing upon the contract? Many decisions have been announced on somewhat similar prohibitions, which we shall not undertake to review. Suffice it to say that decisions under statutes expressly making such contracts void may readily be distinguished from those which we shall cite. We shall assume that the construction company could not have brought suit on its contract against the city while the same remained executory in character. And we may also concede that any one interested might during this time have challenged the contract in proper and timely proceedings for that purpose. But the question here presented is much broader than this. It is this: May a taxpayer, after the work has been performed, and accepted by the city —

4. PAVING CON-
TRACT: valid-
ity; interest
of council-
man.

there being no actual fraud shown — successfully resist payment therefor because of a violation of section 943 of the Code? That question was decided adversely to appellant in *Kagy v. Independent Dist.*, 117 Iowa, 694, where the cases from other jurisdictions are examined and commented upon. See, also, to the same point, *Roberts v. Bank*, 8 N. D. 504 (79 N. W. Rep. 1049); *Pickett v. School Dist.*, 25 Wis. 551 (3 Am. Rep. 105); *Schenley v. Allegheny*, 36 Pa. 29 (78 Am. Dec. 359); *Beaser v. Paving Co.* (Wis.), 98 N. W. Rep. 525; *Currie v. School Dist.*, 35 Minn. 163 (27 N. W. Rep. 922); *Frink v. Brinkley*, 61 Ark. 397 (33 S. W. Rep. 527); *Gardner v. Butler*, 30 N. J. Eq. 702; *Concordia v. Hagaman*, 1 Kan. App. 35 (41 Pac. Rep. 133); *Field v. Barber Co.*, 194 U. S. 618 (24 Sup. Ct. 784, 48 L. Ed. 1142). While some of the cases cited by appellant seem to support her contention, most if not all of them are based on the language of the statutes construed. In some of them the remarks made by the judges writing the opinions were obiter, and in others a rule was announced which does not commend itself to a chancellor who at all times is seeking to do equity.

We have now considered all the points made, and find no reversible error. The motions submitted with the case are without merit, and they are each overruled. The decree is right, and it is *affirmed*.

IN RE ESTATE OF SAMUEL DEANER, Deceased, CLAIM OF
SUSAN C. DEANER, Appellant.

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|------|-----|
| 126 | 701 |
| 1139 | 57 |

Husband and wife: ACTION BY WIFE. Where a wife loans her husband money from her separate estate, taking his note therefor, she has a right under Code, section 3155, to maintain an action on the same against him during coverture.

Limitation of actions. The statute of limitations will run against
2 a debt due from a husband to his wife the same as in other cases.

Trusts. Where a wife turned her own money over to her husband, who gave his notes therefor and used the same as his own, it could not be regarded as held in trust by him in the absence of a showing that he agreed to so hold it for her.

Appeal from Black Hawk District Court.—HON. F. C. PLATT, Judge.

TUESDAY, MARCH 7, 1905.

SAMUEL DEANER died in 1901, and his widow, Susan C. Deaner, was appointed administratrix of his estate. On the 11th of November, 1901, she filed, as a claim against the estate, two promissory notes, dated June 20, 1884, and December 1, 1890, respectively — the first for \$835, and the last for \$500 — each bearing interest at the rate of six per cent. per annum, and payable on demand. A special administrator was appointed, who reported in favor of the allowance of the claim, but to this the heirs objected on the ground that the notes were barred by the statute of limitations. The court sustained this plea, and claimant appeals. — *Affirmed.*

Mullan & Pickett, for appellant.

Millar & Williams, for appellee.

LADD, J.—The notes upon which the claim against the estate of deceased is based were executed more than ten years prior to his death, and were payable on demand. The consideration was the loan of money belonging to claimant to her husband. To this claim the bar of the statute of limitations was interposed as a defense. The claimant contends that this ought not to have been sustained, for that the wife could not have maintained an action on the notes against her husband in his lifetime, and hence that the period of the statute did not begin to run until coverture had been removed by death, and

1. HUSBAND AND WIFE: action by wife.

further that, even if this be not so, the general statute of limitations does not apply to contracts between husband and wife. Neither of these propositions is sound. Claimant had the right to contract with her husband with respect to her separate estate, and such was the money for which the notes were given. See *Logan v. Hall*, 19 Iowa, 491; *Payne v. Wilson*, 76 Iowa, 377; *Hoaglin v. Henderson & Co.*, 119 Iowa, 720; *McElhaney v. McElhaney*, 125 Iowa, 278. Section 3155 of the Code declares that, "Should the husband or wife obtain possession or control of the property belonging to the other before or after marriage, the owner may maintain an action therefor or for any right growing out of the same in the same manner and extent as if they were unmarried." In borrowing her money, the deceased obtained possession of her property, and the agreement contained in the notes to repay conferred a right growing out of the same, which she, under the express provisions of the statute, was entitled to enforce in an action against him at any time after the execution of the notes. *Mereness v. First Nat. Bank*, 112 Iowa, 11.

No exception in behalf of married women, of actions against their husbands, is found in the statute of limitations. It provides that "actions may be brought within the times herein limited respectively, after their causes
 2. LIMITATION OF ACTIONS. accrue and not afterwards, except when otherwise specially declared. * * * Those founded on written contracts * * * within ten years." Section 3447, Code. As all exceptions not "otherwise specially declared" are excluded, we are not permitted to insert any, even though we might think that, owing to the relation of the husband and wife, she should be relieved from the necessity of pressing her claims against her husband in order to keep them alive. That was a matter for legislative consideration, and does not constitute a reason for refusal by the courts to give effect to a specific statute to the contrary. *Wilson v. Wilson*, 36 Cal. 447 (95 Am. Dec. 194); *Wyatt v. Wyatt*, 81

Miss. 219 (32 South. Rep. 317); *Gray v. Gray*, 13 Neb. 453 (14 N. W. Rep. 390); *Bromwell v. Schubert*, 139 Ill. 424 (28 N. E. Rep. 1057); *Muus v. Muus*, 29 Minn. 115 (12 N. W. Rep. 343). And see, as recognizing the applicability of the statute, *Stewart v. McFarland*, 84 Iowa, 55; *Bonbright v. Bonbright*, 123 Iowa, 305; *Roberts v. Brothers*, 119 Iowa, 309. The cases cited from States where the common law prevails—that the wife may not sue the husband—are not in point, and those resting on statutes somewhat similar to ours do not meet our approval. See *Second Nat. Bank v. Merrill*, 81 Wis. 151 (50 N. W. Rep. 505, 29 Am. St. Rep. 877); *Barnett v. Harsbarger*, 105 Ind. Sup. 410 (5 N. E. Rep. 718). That the first of these was erroneous is conceded in the later case of *Brader v. Brader*, 110 Wis. 423 (85 N. W. Rep. 681), though followed because of property interests involved; and the reasons given in the last would have been more pertinent if offered in support of an amendment to the statute by the legislature.

There is no ground for the suggestion that the money was retained by the husband as a trust fund. He is not shown to have agreed to hold it for her. On the contrary, he made use of it as his own, and, in the notes, promised to repay. It was merely a debt of his to his wife, and could only have been enforced as such. *Muus v. Muus*, 29 Minn. 115 (12 N. W. Rep. 343).

We conclude that the claim was barred, and was rightly rejected.—*Affirmed*.

E. A. REA, Appellee, v. JOHN A. FERGUSON, ET AL., Appellants.

Specific performance: PARTIES. Where a deed to real property pursuant to a contract of sale was deposited with a bank in escrow, the bank was a proper party to an action for specific

performance of the contract where delivery of the deed was part of the relief asked, and especially where the bank had taken a mortgage upon the property subsequent to the execution of the contract.

Specific performance: JURISDICTION. The courts of this State have
2 jurisdiction to decree specific performance of a contract for the sale of land situated in another State, where the parties to the action are residents of Iowa.

Decree: ELECTION OF REMEDIES. In a suit by the purchaser for specific performance of a contract to convey land, the defendant is
3 not entitled to a decree authorizing him to elect whether he will return the amount paid on the purchase price or accept the balance due and deliver the deed, where time was not the essence of the contract or where he had taken no steps to declare a forfeiture, and especially when such relief was not asked by pleading or otherwise.

Appeal from Van Buren District Court.—HON. ROBERT SLOAN, Judge.

TUESDAY, MARCH 7, 1905.

ACTION in equity for the specific performance of a contract to convey real estate, entered into between the plaintiff, Rea, and the defendant, Ferguson. The contract was reduced to writing, and bears date December 4, 1902. Therein it is provided that the real estate, the subject thereof, and being a farm in Clarke county, Mo., shall be conveyed to Rea by Ferguson upon full payment of the sum of \$16,500; the conveyance to be by warranty deed, accompanied by an abstract of title showing perfect title. Payments of the purchase price were provided to be made as follows: \$7,500 at time of execution of the contract, and \$9,000 March 1, 1903. Concerning the title, it is further provided that, if any imperfections appear in the abstract, Ferguson agrees to correct same within a reasonable time. If title is not perfected by March 1, 1903, "so that the same would be approved by a loan company," then Ferguson agrees to take a first mortgage on the farm to secure the remaining payment, with interest at five per cent., and hold same until title can be

corrected. In its closing sentence, the contract recites: "The deed attached to this contract shall be left with the contract at Manning's Bank, Keosauqua, to be delivered to E. A. Rea at any time when settlement is made as provided herein." The controversy arising out of said contract, and which is the subject of this action, together with the material facts, will be stated in the opinion. From a decree in favor of plaintiff, the defendants appeal.—*Affirmed.*

Berkheimer & Dawson, Wherry & Walker, and E. L. McCoid, for appellants.

Mitchell, Sloan & McBeth and Miles & Steele, for appellee.

BISHOP, J.—I. It is alleged in the petition that the contract and deed were deposited with the defendant Manning's Bank; that thereafter plaintiff offered to perform on his part, and demanded of the bank delivery of the deed in its possession, which the bank refused. Delivery of such deed is a part of the relief prayed for in the petition. On coming in, the bank moved for a dismissal of the action as to it; and this for the reason that the petition did not disclose any interest on its part, either in the contract or the result of the action, and that it was neither a necessary nor a proper party. The motion was overruled, and of this the appellant bank complains. It may be conceded that the presence of the bank was not necessary to an action to enforce the contract. But as the bank was the custodian of the deed executed, and as a delivery of such deed was prayed for, and could be enforced only by a decree binding upon the bank, and, as we shall see presently, as the bank had taken a mortgage on the real estate in question subsequent to the execution of the contract which was the basis of the action, its enforced presence as a party was not improper, to say the least. There was no error in the ruling.

II. The defendant Ferguson assailed the petition by demurrer, the particular ground thereof being that the court had no jurisdiction, inasmuch as the real estate which was the subject-matter of the action was situated in the State of Missouri. As all the parties to the action reside in this State, the point made by the demurrer is ruled adversely to the contention of appellant by the decision in the case of *Wright v. Leclair*, 3 Iowa, 221. The rule of that case was recognized and approved in the recent case of *Epperly v. Ferguson*, 118 Iowa, 47.

2. SPECIFIC PERFORMANCE:
jurisdiction.

III. It is not disputed but that the first payment of \$7,500 was made by Rea to Ferguson at the time and as provided for in the contract. It appears that, after the making of the contract, Rea went to California for the winter, leaving the matter of performance on his part to be attended to by an agent and his attorneys. An abstract of title was furnished by Ferguson, but the condition of the title as shown thereby was made the subject of complaints and requirements on the part of said attorneys, and matters thus stood in an uncompleted condition on March 1, 1903. Within a few days thereafter, Ferguson, who was largely indebted to Manning's Bank, executed and delivered to the bank a mortgage on the real estate in question to secure such indebtedness in the sum of \$10,000, which mortgage was at once made a matter of record. Rea returned to the state during the month of March, and, having failed to secure a completion of the contract deal, this suit was brought. The answer filed by defendants — omitting reference to some matters not material to be considered, in the view we take of the case — alleged perfect title to the lands in Ferguson, as shown by the abstract furnished; that time was of the essence of the contract as to payment of the purchase price; and that plaintiff had failed to make such payment on March 1st, as provided in the contract. The prayer of the answer

3. DECREE:
election of
remedies.

is that the petition be dismissed, with costs. By way of a subsequent pleading, and also while upon the stand as a witness, plaintiff offered to accept of the deed to the land with the title as it then stood, and to pay the sum of \$9,000, with interest from March 1st. This was followed by a statement on the part of the defendant Ferguson, while he was on the stand as a witness on his own behalf, that he had always been ready, and was ready then, to deliver to plaintiff the deed to the land upon payment of the \$9,000 and interest, on condition that he (plaintiff) accept of the title as shown by the abstract.

Upon the case being submitted, the court found that the mortgage given to the defendant Manning's Bank was intended simply to await the payment to be made under the contract by plaintiff, Rea; that such payment was to be made to the bank, and by it applied on the indebtedness of Ferguson, whereupon the mortgage was to be canceled. The decree then provided that in case the plaintiff, Rea, should pay to the defendant bank, for the use of the defendant Ferguson, the sum of \$9,000, with interest from March 1, 1903, at 6 per cent. per annum, within forty days from the date of entry of the decree, or, in case an appeal should be taken, then within forty days from the final disposition of such appeal, the defendant bank should thereupon cancel its mortgage and deliver to plaintiff the deed to the lands in its possession; further, that, if said sum of money should be so paid, the defendant Ferguson should be regarded as holding possession of the lands as a tenant of plaintiff, and should account to him for the rents and profits. The value of the rents for the year 1903 was found to be \$959, and judgment for that sum was ordered in favor of plaintiff against defendant Ferguson, conditioned only upon payment being first made by the former to the bank, provided for as stated above. The costs of the case were ordered taxed to defendant.

The contention for error in the decree as thus entered.

made by appellant, is this: That the decree should have given to defendant the right to elect whether he would return the \$7,500 paid on the contract, or, on the other hand, take the balance due, with interest, and deliver the deed. There are several reasons why the contention thus made should not be sustained. To begin with, time was not by the writing declared to be of the essence of the contract; and, should we concede, as contended for by counsel, that it was competent to establish by evidence aliunde that such was in fact the agreement, notwithstanding the letter of the writing, still it must be said that the record before us stops far short of proving that any such agreement was had between these parties. But aside from all this, the defendant had taken no steps to declare a forfeiture. He had not served a notice as required by sections 4299 and 4300 of the Code. Finally — and this is conclusive of itself — he did not ask the court, by pleading or otherwise, to enter a decree such as that he is now insisting should have been entered.

In view of the attitude assumed by the respective parties, it is manifest to our minds that equity was accomplished by the decree as entered, and that we have no need to enter upon inquiry into any collateral question respecting the character of the title to the lands, or to go any farther by way of a determination of what were the technical rights of the parties, growing out of the failure to perform on or before March 1, 1903.

Accordingly the decree is *affirmed*,

MARTHA O'CONNELL, Appellant, v. D. B. SHONTZ, JOHN A. MAGOUN, JR., and N. JENNESS.

Libel: NOTICE OF DELINQUENT TAXES. A notice to a taxpayer pursuant to Code, sections 1374 and 1385, relative to the assessment of omitted property, is not libelous in the absence of any charge of fraud on the part of the taxpayer in withholding the same.

Appeal from Woodbury District Court.—HON. F. R. GAYNOR, Judge.

WEDNESDAY, MARCH 8, 1905.

THE petition alleges: That, at the time of the transaction complained of, the defendant Shontz was employed by the county to discover property omitted from the tax lists, Magoun was treasurer, and Jenness was auditor. That these three, "contriving and intending to injure and defame the plaintiff," maliciously composed and mailed her a notice that the officers had been apprised that moneys and credits to the amount of \$2,800 belonging to plaintiff had been omitted from taxation for the year 1903, and requiring her to appear before the county auditor at a date named and show cause why the same should not be listed and assessed against her, and that, upon her failure to do so, the same would be placed on the books; and demand was made for payment, and a statement that unless made, proceedings would be commenced after the lapse of thirty days to collect. That she received the notice, and was greatly distressed by the accusations contained therein, and was obliged to travel to Sioux City and appear before the auditor, and was obliged to incur expense in making the trip, in consulting an attorney, and in loss of time, to her great damage. The defendants demurred to this petition on the grounds (1) that the notice was not libelous; (2) that the defendants were acting as agents and officers of the county; and (3) that there was no allegation that the acts were malicious. The demurrer was sustained, and plaintiff appeals.—*Affirmed.*

Sawyer & Turner, for appellant.

Earl Edmunds, McCoy & McCoy, and *Strong & Whitney*, for appellees.

LADD, J.—The notice sent to the plaintiff was in strict conformity with sections 1374 and 1385 of the Code, as amended by chapters 47 and 50, pages 31 and 33, of the Twenty-Eighth General Assembly. It was such a notice as the law authorized “whenever property subject to taxation is withheld, overlooked or from any other cause is not listed or assessed.” Even though defendants so intended, it did not purport to state the reason for the omission; and there is no ground for saying that it contained, directly or by implication, a charge of cheating and defrauding the state and country, or of having committed perjury in swearing to a false assessment. In the absence of any innuendo, it cannot be held to have been libelous. This is the only question raised in argument on the appeal, and in this respect the ruling on the demurrer was correct. But see *Hollenbeck v. Ristine*, 105 Iowa, 488.—*Affirmed*.

DANIEL R. BROWN, JULIET E. WOOD and L. B. ADAMS,
Appellants, v. A. R. COLE and A. A. COLE.

Deeds: MENTAL INCAPACITY: FRAUD: UNDUE INFLUENCE. In an action to set aside a deed on the ground of mental incapacity, the evidence is reviewed and held insufficient to establish incapacity, fraud, or undue influence.

Appeal from Story District Court.—HON. W. D. EVANS,
Judge.

WEDNESDAY, MARCH 8, 1905.

ACTION to set aside a deed on the ground that it was procured by fraud, duress, and undue influence, and was without consideration, and that the grantor was mentally incompetent to execute a valid deed. Decree for defendants. Plaintiffs appeal.—*Affirmed*.

E. H. Addison, for appellants.

Geo. W. Dyer and *D. J. Vinje*, for appellees.

MCCLAIN, J.—The deed to which this controversy relates describes a fractional quarter section of land on which the grantor; Daniel R. Brown, was residing at the time of the execution of the deed, and which had been the homestead of himself and wife—his wife being then recently deceased—for many years. In 1885 the grantor made his will, in which he devised another quarter section to Nathaniel A. Cole and wife, parents of the defendants in this action, subject to a life estate to his widow, should she survive him, and subject also to the obligation to take good care of testator and his wife as long as either of them should live. The fractional quarter described in the subsequent conveyance was by the will devised, an undivided one-half to Daniel Brown, a nephew of testator, and an undivided one-fourth each to Julia E. Wood and L. B. Adams, nephews of testator's wife. The grantees in the deed in question are grandnephews of testator's wife, their mother being a sister of Mrs. Wood. The effect of the conveyance, which was made in 1901, was to defeat the devise of the fractional quarter section to plaintiffs, and they seek to have the conveyance set aside.

The evidence for plaintiffs tends to show that at the time the conveyance was executed the grantor was about eighty years of age, and had been for twenty years very much crippled by rheumatism, so that he was quite helpless, and for much of the time was confined not only to the house, but to his bed, and that his infirmities had increased, especially after the death of his wife. But it also appears that while in this crippled condition he had been able to transact business, and had been a man of strength of character, intelligence, and self-reliance. There is nothing in the record to indicate any change in his mental capacity, notwithstand-

ing the increased frailty of his health, due to his physical incapacity and advancing years. In short, there is no evidence such as to satisfy us that he had not sufficient mental capacity to execute a valid conveyance.

For some years prior to the execution of the deed, Nathaniel Cole and his wife — the later being, as already indicated, the niece of grantor's wife — had resided in a separate house in the same yard with the house in which grantor and his wife had lived; the Coles having three children, of whom the defendants are two. And the evidence tends to show that grantor and his wife and the Cole family practically lived together — at any rate, to this extent: that the members of the Cole family, and especially the two defendants, looked after and cared for the grantor and his wife, and the grantor after the death of his wife; and on this relationship is predicated the claim of undue influence. But it is to be noticed that, whatever may have been the relations between the grantor and Nathaniel Cole and his wife, there is no evidence of such relation between these defendants and the grantor as to give rise to any confidential relations from which a presumption of undue influence could rise; and there is absolutely no evidence that any influence was actually exerted by any member of the Cole family to secure the making of this conveyance. So far as it appears, it was voluntarily and freely made. Nor is it entirely without consideration. The deed recites a consideration of \$660, and, while the testimony tends to show that no money consideration was actually paid, it does not negative a consideration in services which the defendants may have rendered to the grantor in carrying on the farm. They were not members of his family, but of the family of their parents; and, if they rendered valuable services for him, even without express contract, there would be an implied obligation to make compensation. One of the witnesses for plaintiffs testifies that the Coles lived on the farm of grantor as renters. Moreover, the deed is on condition that grantor retains a life

lease on the premises, and that one year after his death the grantees shall pay to Juliet E. Wood and L. B. Adams, each, the sum of \$165.

In the absence of any evidence of fraud or undue influence, we have no ground presented to us which would warrant or require the setting aside of this deed, and the decree of the lower court in favor of defendants is therefore *affirmed*.

J. B. WOODWORTH v. MILTON McKEE, Appellant.

Certification of records. The certificate of a clerk of courts of a
1 foreign State which refers to and is attached to a copy of the
record certified, will be presumed to have been lawfully made
and to certify to the copy of the record to which it is attached,
although made on a separate sheet.

Jurisdiction: PRESUMPTION. Where the certificate to a judgment
2 record of another State shows that the judgment was rendered
by a court of record with a clerk and seal, it will be presumed
that the court had jurisdiction of the parties and the subject
matter, until the contrary is shown.

Appeal from Black Hawk District Court.—HON. A. S.
BLAIR, Judge.

WEDNESDAY, MARCH 8, 1905.

SUIT at law on a judgment rendered against the defendant by the circuit court of McHenry county, Ill. There was a judgment for the plaintiff, from which the defendant appeals.—*Affirmed*.

Hemenway & Martin, for appellant.

Alfred Grundy, for appellee.

SHERWIN, C. J.—The plaintiff alleged in his petition that the circuit court in and for the county of McHenry, State of Illinois, was a court of general jurisdiction created

by the laws of that State, and that in September, 1902, there was pending in said court an action commenced by the plaintiff against the defendant, in which there was a judgment rendered for the plaintiff against the defendant on the 15th day of December, 1902.

A certified copy of the judgment sued on was attached to the petition, which recited that the defendant appeared by attorney, and, further, "It appearing to the court in the pleadings and evidence in this cause that the complainant is entitled to recover the sum of \$330.27 from the defendant, * * * it is further ordered, adjudged, and decreed that the complainant, J. B. Woodworth, have and recover from the said defendant, Milton McKee, the sum of \$330.27, and that execution issue therefor." The copy of the judgment was certified to as follows: "State of Illinois, McHenry County. I, G. B. Richards, clerk of the circuit court in and for said county, in the State aforesaid, do hereby certify the foregoing to be a true, perfect, and complete copy of the final judgment, execution, and return of sheriff. In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Woodstock, this 31st day of January, 1903." This was signed and sealed by the clerk. Following it, there was the usual certificate of the judge of the circuit court that G. B. Richards was the clerk of said court and the keeper of its records and seals, and the certificate of Richards that the judge certifying was a judge of said court. The appellant did not deny the rendition of the judgment against him, but did deny the jurisdiction of the court to try and determine the cause, and alleged that no summons was served on him, and that no appearance was authorized by him.

The copy of the decree was received in evidence, over the appellant's objection, and of this he complains, first, for the reason that the certificate of the clerk does not properly and sufficiently identify the record to which it applies. The clerk's certificate was on a sep-

arate sheet of paper, which was attached to the copy of the decree by fastening the sheets together, and this is said to be insufficient. We do not think so, however. The certificate specifically refers to the matter preceding it, and must be presumed to have been lawfully made, and to certify to the copy of the record to which it is attached.

The appellant denied the jurisdiction of the circuit court to hear and determine the subject-matter of the cause, and now contends that such denial placed the burden of proving jurisdiction on the plaintiff. It is no

2. JURISDICTION: presumption. doubt true that the jurisdiction of a court of a sister State may be challenged in an action on a judgment, and, for the purposes of this case alone, it may be conceded that, when it is so questioned the burden rests on the party asserting the jurisdiction. But here the certificates to the judgment record show that the court rendering the judgment was a court of record with a clerk and seal, and, such being the case it will be presumed, until the contrary is shown, that it had jurisdiction of the subject-matter and of the parties. *Coughran v. Gilman*, 81 Iowa, 442. And see, also, on the subject generally: 11 Ency. Pleading & Practice, 1131, and cases cited; *Gunn v. Peakes*, 36 Minn., 177 (30 N. W. 466; 1 Am. St. Rep. 661); *Gates v. Newman*, 18 Ind. App. 392 (46 N. E. 654); *Galpin v. Page* (U. S.) 21 L. Ed. 959.

The appellant offered no evidence on the issue of jurisdiction, and the presumption to which we have referred is therefore controlling, and the judgment should be, and it is, *affirmed*.

P. DALY, Appellant, v. OLAF SIMONSON, Appellee.

Pleadings: AMENDMENT: DISCRETION OF COURT. In an action to restrain the removal of fixtures by a tenant, it was not an abuse of discretion to strike from defendant's amended answer allegations alleging a new cause of action for conversion of the

fixtures, by way of a counterclaim, so far as the same asked for affirmative relief, and permitting it to stand as to the defensive matter.

Landlord and tenant: REFORMATION OF INSTRUMENTS. Where a lessor, in preparing a lease, takes advantage of his tenant's ignorance and confidence in him, and omits a provision authorizing the tenant to remove improvements placed on the premises by him, equity will reform the instrument.

Right of tenant to improvements. Where improvements were placed on land by a tenant under a lease authorizing him to remove the same, the tenant did not lose his right thereto by taking a lease from a subsequent purchaser while in possession, which failed to reserve the same.

Costs. Where the merits of a controversy are found against a plaintiff, the defendant is entitled to full costs, though during the trial he disclaimed any interest in a portion of the property in controversy.

Appeal from Webster District Court.—HON. W. D. EVANS,
Judge.

WEDNESDAY, MARCH 8, 1905.

ACTION in equity to restrain defendant from removing certain fixtures from land owned by plaintiff. A temporary writ of injunction was issued as prayed. Thereafter defendant answered, claiming that he was the owner of the fixtures; that they were erected by him as a tenant, and were removable. He amended his answer by pleading a mistake in his lease of the land from plaintiff, and asked for a reformation thereof. Plaintiff denied the alleged mistake, and pleaded that he was the owner of the fixtures. Defendant thereupon pleaded a counterclaim against the plaintiff for the conversion of the fixtures. To this plaintiff interposed a motion to strike, which was sustained in so far as to eliminate the prayer for judgment. On the issues joined the case was tried to the court, resulting in a decree dismissing plaintiff's petition, and a finding that defendant was the owner of the fixtures in dispute. The temporary writ of

injunction was dissolved, and the costs of the case taxed to the plaintiff. Plaintiff appeals.— *Affirmed.*

Mitchell & Hackler, for appellant.

Farrell & Price, for appellee.

DEEMER, J.— Defendant obtained possession of the land upon which the improvements were placed through a lease from the then owner thereof, the Webster Coal & Land Company, which provided that he should build the fences and buildings necessary for his own convenience, or required by law, “having the right to remove the same at the termination of the lease.” This lease, or some of the renewals thereof, expired March 1, 1901. While defendant was in possession of the land under his lease, of which the last was a renewal, he made various improvements upon the place. Some time in the year 1900 plaintiff purchased the land from the Webster Coal & Land Company by warranty deed, which contained the following: “This conveyance being subject to the following leases: A lease to Olaf Simonson, dated Oct. 4th, 1899,” etc. The lease to Simonson was also turned over to plaintiff.

After plaintiff received his deed, he leased the premises to the defendant for the period of one year from and after March 1, 1901. This lease was made by plaintiff and one Butler, and it did not expressly give the defendant the right to place improvements upon the land, or to remove any such from the premises; but did provide that the lessee should protect the buildings, fences, and improvements, and that he should keep the same in repair. Defendant contends that this lease should have contained a provision permitting him to make improvements and to remove the same from the land, and also reserving from the operation thereof all improvements theretofore placed by him upon the land; and that through mistake and oversight this clause was omitted, and he asked that the instrument be reformed ac-

cordingly. The improvements in question were placed upon the land by the defendant during the term of his leases from the coal and land company, and were, as against that company, removable in character. The amendment to the answer which plaintiff moved to strike, pleading a counterclaim for conversion, was stricken in so far as it asked for affirmative relief, but was permitted to stand in so far as it pleaded defensive matter. This defensive matter was really pleaded in prior answers filed by defendant; but, even if this were not true, and additional matters were therein pleaded, the trial court, in its discretion, might permit the same to stand. *Newman v. Ins. Co.*, 76 Iowa, 56; *Phoenix Ins. Co. v. Dankwardt*, 47 Iowa, 432; *Jones v. Cooley*, 106 Iowa, 165.

II. The testimony as to the alleged mistake in the lease was sufficient to justify the trial court in decreeing its reformation. Defendant could neither read nor write.

2. LANDLORD AND TENANT: reformation of instruments. He had great confidence in plaintiff, and for more than ten years had advised and counseled with him in all business matters in which he was interested. He relied upon plaintiff's preparing a lease which would fully represent their previous negotiations. There is no doubt that both understood defendant should have the right to remove all improvements by him placed upon the land prior to the time plaintiff acquired title thereto. By mistake this lease did not express their agreement, and it should be reformed so as to do so. It may be that plaintiff labored under no mistake in having the lease prepared as he did, but he knew what defendant understood its terms were to be, and took advantage of his relations with the defendant to obtain a more favorable contract than he was entitled to. In such cases equity will afford relief. *Williams v. Hamilton*, 104 Iowa, 425.

Plaintiff is not an innocent purchaser of the land. Defendant was in possession of the premises, at the time he (plaintiff) purchased, under leases from the coal and land company, each of which contained the provisions we

have quoted with reference to improvements. His lease to defendant was practically a renewal of the leases theretofore executed by the coal and land company. True, this last lease did not contain any reservations or exceptions; but it did not cover anything aside from the land and its proper fixtures. It surely did not deprive defendant of his property. Of course, a tenant must ordinarily remove fixtures and improvements, at least within a reasonable time after the expiration of his lease. *Mickle v. Douglas*, 75 Iowa, 78. There are some cases which seem to hold that, if a tenant takes a renewal lease which contains no reservations, he by that act surrenders his right to removal of the fixtures placed by him upon the land during the term created by the prior lease. But we have not followed that rule. *McCarthy v. Trumacher*, 108 Iowa, 284; *Union Co. v. Willmar*, 116 Iowa, 392. When the improvements were erected in this case, they, by express agreement between landlord and tenant, were personal property; and by taking the lease from plaintiff defendant did not surrender his claim thereto. See *McCarthy Case*, supra, and the following: *Kerr v. Kingsbury*, 39 Mich. 152 (33 Am. Rep. 362); *Bank v. Merrill*, 69 Wis. 501 (34 N. W. Rep. 514); *Fischer v. Johnson*, 106 Iowa, 182 (76 N. W. Rep. 658); *Wright v. MacDonell*, 88 Tex. Sup. 140 (30 S. W. Rep. 907). So that, even if the lease from plaintiff and Butler to defendant be not reformed, we do not think defendant lost his title to the personal property.

III. Lastly, it is argued that the court was in error in not apportioning the costs. This is based on the proposition that during the trial defendant disclaimed any interest in and to part of the property, and that as to that part plaintiff was successful. Taking the entire record, we think it satisfactorily appears that the only real controversy was over fixtures which defendant had the right to remove,

8. RIGHT OF
TENANT TO
IMPROVE-
MENTS.

4. COSTS.

and that on the issue of reformation alone defendant was entitled to have all the costs taxed to the plaintiff. The merits were found against the plaintiff, and he should pay the costs. *Tredway v. McDonald*, 51 Iowa, 663. At any rate, we are not justified in disturbing the order of the trial court with reference thereto.

The decree is correct, and in all respects it is *affirmed*.

IOWA BRICK MFG. CO. v. O. P. HERRICK, Appellant, AND
OTHERS.

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| 126 | 721 |
| 136 | 384 |

Contracts: SEVERABILITY. A contract to furnish brick for paving,
1 purposes, payments to be made monthly for those furnished during the month, is severable, and failure to pay an installment will not release the seller from the contract.

Election of remedies. In an action for the price of brick sold for
2 sidewalk purposes, notice to the manufacturer in effect that the contractor would purchase brick elsewhere and charge the difference in cost to the manufacturer, he having failed to furnish the same according to contract, was not an election of remedies constituting a waiver of the contractor's right to recover damages upon the contract other than the difference in the cost of the brick.

Breach of contract: DAMAGES. Where a manufacturer failed to fur-
3 nish a contractor with brick for the construction of walks as agreed, the contractor was entitled to recover as his damage the difference between the contract price and what he was compelled to pay elsewhere, on such walks as he had built or was directed by the city to build under his contract, but not upon such walks as he might have procured orders to construct.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

THURSDAY, MARCH 9, 1905.

THIS suit was brought to recover the agreed price for brick sold and delivered to the defendant, Herrick, under

a written contract. In a counterclaim Herrick alleged a breach of the contract, and asked damages for a failure to deliver brick as agreed therein. There was a trial to a jury, and a verdict for the plaintiff for the amount of its claim less the damages found due the defendant on his counterclaim. Both parties appeal. The defendant will be designated the appellant.—*Affirmed*.

J. K. Macomber, for appellant.

Bailey & Stipp, for appellee.

SHERWIN, C. J.—The plaintiff undertook to furnish the defendant during the season of 1902, sidewalk brick of a specified kind and quality, which were to be delivered at such times and places as should be designated by the defendant; and the defendant agreed to pay therefor \$9.15 per thousand. The brick delivered in April were to be paid for in cash on the 1st day of July, those delivered in May were to be paid for on the 1st day of August, and payments were to be made on the 1st day of each succeeding month thereafter during the life of the contract. The appellant did not pay as he had agreed to do, but notified the plaintiff that the brick furnished him were not of the kind and quality contracted for, and that the city had refused to accept them, and had refused to pay for his work. There was evidence tending to show that the plaintiff conceded the inferior quality of the brick, and consented to defer payments therefor until the matter had been adjusted with the city. After this, however, the plaintiff refused to further furnish brick until those already delivered were paid for, and thereupon the appellant, on the 22d day of September, 1902, notified the plaintiff as follows: "You having refused to furnish brick for further use in sidewalks as provided in your contract made in 1902, this is to notify you that I shall at once proceed to purchase brick elsewhere at the best rates I can get

1. CONTRACTS:
severability.

for sidewalks which must be built, and charge the same to your account." As a matter of fact, the appellant did purchase some brick of others, but he was unable to procure the desired quantity, and in his counterclaim he asked to recover the difference in the price paid for the brick so bought and his contract price with the plaintiff, and, further, for the profits that he would have realized on his contracts with the city had the plaintiff furnished the brick required to do the work. The appellant was allowed the damages first mentioned and a part of his other claim. The appellee contends that upon the appellant's refusal to pay according to the contract there was a breach thereof, which released it from further obligation to furnish brick and from liability for damages therefor. The contract in this case cannot, however, be distinguished from those in the cases to which we shall presently refer, and under the rule there announced it was severable, and a refusal or failure to pay an installment due did not release the appellee from its contract. *Myer & Dostal v. Wheeler & Co.*, 65 Iowa, 390; *Osgood v. Bauder & Co.*, 75 Iowa, 550; *Hansen & Linehan v. The C. S. Heating Co.*, 73 Iowa, 77.

The plaintiff attempted to show that the appellant was unable to pay for the brick which had been furnished him because of his financial condition, but there was no issue of this kind in the case, and the testimony was properly rejected.

The plaintiff contends that the notice served on it, stating that the appellant would purchase brick elsewhere, and charge the difference in the price thereof to it, in case of a further refusal to comply with its contract, was
2. ELECTION OF REMEDIES. an election of remedies on the part of the appellant, and a waiver of any other measure of damages. But with this proposition we are unable to agree. If it be conceded that the notice related to a remedy within the legal meaning of the term, it is evident from the record that it did not constitute such an election of remedies as to

bind the appellant. In the first place, the appellant had before this time served on the plaintiff a notice that, if brick were not furnished according to the contract, he would hold it liable for all damages suffered on account thereof, and stating further therein that he would try to buy brick elsewhere. The effect of the two notices was to notify the plaintiff that the appellant would purchase brick of others, if possible, but that, in any event, it would be held for all damages suffered by a breach of the contract. The doctrine of the election of remedies is founded on the principle that a man may not take two contradictory positions which are so inconsistent that the assertion of one necessarily repudiates the other, when he has actual knowledge of all the facts or the means of knowing them. *Elevator Co. v. U. P. Ry.*, 97 Iowa, 719. And, furthermore, the record fairly shows that at the time of the claimed election the appellant supposed, and had reason to believe, that he could procure the necessary brick of others, and it is conclusively shown that he was unable to procure them on the market. It was his duty to buy elsewhere, if possible, and the measure of his recovery would then be the difference between the price paid and the contract price. But it is well settled, and conceded by the appellee, that, if goods to be used for specified purposes cannot be bought on the market, a recovery may be had for the reasonable profits lost by a breach of the contract. *Boies & Barrett v. Vincent*, 24 Iowa, 388; *Richmond & Jackson v. The Ry. Co.*, 40 Iowa, 264; 33 Iowa, 422; *Manville v. Tel. Co.*, 37 Iowa, 219.

The appellant therefore did nothing more, in effect, than to notify the plaintiff that he would do what the law required him to do — that is, purchase brick on the market, if he could; and he did not thereby waive the right to another measure of damages if he was unsuccessful. He might, as he did in fact, buy some brick on the market, and still be unable to secure the quantity that the plaintiff had undertaken to furnish him. Hence his claim for profits on

the work he was unable to do because he could not get the brick was not so inconsistent with his notice as to preclude a recovery therefor. The general rule of estoppel is not applicable, because the plaintiff did not claim that it relied on the alleged election, but, on the contrary, it conclusively appears that its refusal to furnish more brick was because of the defendant's failure to pay for those already furnished. The appellant recovered the profits on 78,000 feet of walk which he was unable to build for want of brick and the difference between the price he was to pay and the price paid for the brick bought on the market, and these damages he was clearly entitled to. The amount allowed as profits is probably too large by a few dollars on account of the wages paid by the appellant to Campbell, but it is so small that we shall not disturb the judgment on account thereof.

The appellant also contends that he should have been allowed the profits on a much larger amount of work that he was unable to do, and that the court erred in excluding

testimony tending to prove that his contract with the city provided for that particular work. The city, by ordinance, provided for

3. BREACH OF
CONTRACT:
damages.

the building of sidewalks of either brick or cement, and the appellant's contract therewith was for brickwork only. By the terms thereof he was to commence work at the time fixed by written order of the board of public works, and not until such order was issued. The procedure was as follows: Where walks were ordered, the property owner was given ten days' notice thereof, and that the walk must be of either brick or cement; and further, that if he failed to build the same, it would be built by the board of public works of one of such materials, and the cost thereof assessed against the property. Upon failure of the property owner to comply with the order, a written notice was given to the contractor to go ahead and construct the walk; the board having determined whether it should be of brick or of cement. The appellant was permitted to show the notices or orders

actually issued to him by the board, and was allowed profit for the work which he might have done thereunder had he been supplied with brick. But the court rejected testimony offered tending to show that other notices or orders would have been issued to him had he called for them, and also rejected the notices which had been served on the property owners requiring them to build, and held that the appellant's contract with the city did not authorize him to build walks until notices were issued to him by the board of public works. We think the ruling correct. The appellant's contract with the city was general in its terms, and only provided that he should build such walks as were ordered constructed of brick, and not those until he received a written order therefor. His contract did not specify the amount of work he was entitled to thereunder, and it was optional with the board of public works whether walks should be of brick or cement. It was therefore a proper requirement that the contract should cover no work that he was not ordered in writing to construct. Unless he was ordered to do specified work, he had no right to do it, or to the profits that might accrue therefrom; and hence it was immaterial whether he might or might not have procured such orders had he asked for them. They were not in fact issued, and the appellant cannot be permitted to speculate on chances at the expense of the plaintiff. The item of interest allowed the appellant on the difference in price of brick is offset by the interest allowed the plaintiff on its full claim, and we shall not further notice the matter.

There was no error in the apportionment of the costs, and the judgment is affirmed on both appeals.— *Affirmed.*

S. Y. EGGEET, Appellant, v. HELEN E. SMITH PRATT, ET AL., Appellees.

Specific performance: BREACH OF CONTRACT: DAMAGES. The purchaser of a minor's interest in real property under a contract with the guardian, having knowledge of the minority and the necessity of an order of court to make the conveyance, cannot, on the dismissal by the court of an application for such order, recover substantial damage for loss of profits in an action for specific performance.

Appeal from Wright District Court.—HON. W. D. EVANS, Judge.

THURSDAY, MARCH 9, 1905.

ACTION in equity to enforce specific performance of contract to sell real estate. Decree for plaintiff as to an undivided one-third of the land, and assessing damages against the defendant Helen E. Smith Pratt in the sum of one dollar. The plaintiff appeals.—*Affirmed*.

J. H. Scales, for plaintiff.

Birdsall & Birdsall and *Nagle & Nagle*, for appellees.

WEAVER, J.—Helen E. Smith Pratt, being the owner of the undivided one-third of the land in question, and guardian of her minor daughter, who owned the other undivided two-thirds, entered into a written contract to convey the entire property to the plaintiff. In entering into the contract, plaintiff knew the condition of the title, and knew that a conveyance of the daughter's interest could be had only by authority to be obtained from the court. Proceedings were afterward begun to obtain the necessary authority to make a conveyance, but were dismissed. It appears from

the evidence, that about the time the contract was made, land in Wright county was advancing rapidly in value, and that the sale, if carried into effect, would have materially prejudiced the interests of the ward. The court below refused to specifically enforce the agreement, except as to the one-third owned by Helen E. Smith Pratt, and refused to allow plaintiff more than nominal damages on account of defendant's failure to make title to the remainder of the property.

The question presented in argument is upon plaintiff's demand for substantial damages. It is shown that the land, at the date when it should have been conveyed according to the contract, was worth materially more than the agreed purchase price, and it is plaintiff's contention that defendant is answerable to him for the margin of profit thus lost. Had defendant represented herself as the owner of the land, and as such entered into the contract to convey it, she would ordinarily be subject to the rule relied upon by plaintiff, and liable to him in damages in the amount by which the market value of the land exceeds the contract price. But this rule has been held by us not to apply where, to the knowledge of both buyer and seller, the latter has no title, and without fraud or bad faith on his part fails to make or convey title in discharge of his contract. In such case there can be no recovery for loss of profits. *Foley v. McKeegan*, 4 Iowa, 1; *Sweem v. Steele*, 5 Iowa, 352; *Sawyer v. Warner*, 36 Iowa, 333; *Yokom v. McBride*, 56 Iowa, 139; *Donner v. Redenbaugh*, 61 Iowa, 269. See, also, cases to same point cited in 29 Am. & Eng. Enc. L. (2d Ed.) page 724, note 10.

In *Gerbert v. Trustees*, 59 N. J. Law, 160 (35 Atl. Rep. 1121; 59 Am. St. Rep. 578), the New Jersey Court of Errors and Appeals, after a review of the authorities, overrules its former decisions to the contrary, and holds to the doctrine that when a seller of real estate is, without fraud or wrong on his part, unable to make the promised title, he

is not chargeable with the damages, and the purchaser's right of recovery will be confined to the payment, if any, he has made on the agreed price. In *Margraf v. Muir*, 57 N. Y. 155, we have a case much like the one at bar. A mother, having a dower interest in lands of which her infant child was the principal owner, entered into a contract to convey the entire property to a purchaser who knew the nature of her right and authority in the premises. The land was worth materially more than the agreed price, and the authority to sell could not be obtained, and it was held that the mother was not liable in damages. Stress is laid on the fact that the purchaser took the contract knowing the true condition of the title, and that the seller could make no effective conveyance without authority from the court. It is true that in the cited case it was also found that the buyer had obtained an undue advantage by reason of his knowledge, and the seller's want of knowledge, of the real value of the property, but the decision does not necessarily turn upon that circumstance. It is to be conceded that plaintiff's claim is not without considerable support in the books, but in our judgment the decided weight of authority is against the proposition. Indeed, many of the cases go to the extent of holding that, even in cases where the failure to convey is caused by the fraud or wrong of the seller, the right to recover damages is limited to the purchase money paid, with reasonable expenses incurred in investigating the title. *Bain v. Fothergill*, L. R. 1 H. L. 158.

There is no showing of fraud on part of the seller in the present case, and we need not, therefore, consider how far, if at all, we should feel obliged to follow this line of authorities. *Cornell v. Rodabaugh*, 117 Iowa, 287, is not inconsistent with the conclusion we have reached. There the seller had title, and sought to avoid specific performance because of an incumbrance which she herself had placed upon the property. She could have conveyed a good title, and could at a reasonable expense have removed the incum-

brance, but, failing so to do, she was held to respond in damages. In *Conner v. Baxter*, 124 Iowa, 219, it does not appear that the seller disclosed to the buyer his lack of authority to make a good title; while the decision in *Townsend v. Blanchard*, 117 Iowa, 36, is made to turn upon the construction of a statute which is not here applicable.

After a careful review of the record and of the authorities bearing upon the questions presented in argument, we are of the opinion that the decision of the trial court is correct, and it is therefore *affirmed*.

HENRY F. BURK, Appellee, v. CREAMERY PACKAGE MANUFACTURING Co., Appellant.

Sale of poison: NEGLIGENCE. The sale of poisonous substances
1 without labeling the same as required by law, is negligence
per se.

Proximate cause of death. In an action for the death of plaintiff's
2 son caused from drinking a poisonous liquid sold by defendant
without labeling as required by law, it was incumbent on plaintiff to show that such violation of the statute was the proximate cause of the death.

Intervening negligence. Negligence on the part of the purchaser
3 of poison will not necessarily excuse the vendor for his violation of the law requiring it to be labeled.

Negligence. It is not necessary that one should foresee the consequences of a wrongful act to be liable for an injury resulting therefrom.
4

Proximate cause. Where several proximate causes contribute to an accident, and each is an effective cause, the result may be attributed to any or all of the causes.
5

Negligence. Where a jug of poison was deposited in a creamery
6 at a place where similar receptacles were usually kept containing buttermilk, permission of the creamery manager to take a drink of buttermilk was not of itself negligence, it not appearing that he knew one of the jugs to contain poison.

Instruction: PROXIMATE CAUSE. In an action for negligence, it is
7 not error for the court to use the term "proximate cause" in an instruction, without defining it.

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| 148 | 671 |
| 144 | 621 |

Same. Under the issues, an instruction that the fact that employes of 8 a creamery, at which place the deceased drank poison from a jug supposed to contain buttermilk, knew the jug contained poison, did not relieve defendant from the charge of negligence, provided it sold the same without labeling as required by law, was not objectionable as eliminating from the case the doctrine of proximate cause.

Appeal from Black Hawk District Court.—HON. FRANKLIN C. PLATT, Judge.

THURSDAY, MARCH 9, 1905.

ACTION at law to recover damages for injuries received by plaintiff's minor son, resulting in his death, from drinking sulphuric acid out of a jug in which the drug was sold by the defendant without labeling the same as required by law. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

J. T. Sullivan, for appellant.

Gates & Liffing and Bois & Bois, for appellee.

DEEMER, J.—Defendant is a corporation engaged in the manufacture and sale of creamery supplies, fixtures, etc., at the city of Waterloo. It keeps for sale, and sells, sulphuric acid, which is extensively used in all creameries. On or about January 26, 1903, it sold at retail to one Riedel a one-gallon jug of sulphuric acid, but failed to label the same as required by statute, or to indicate in any manner upon the package that it contained a deadly poison. Riedel owned and operated what was known as the "Crane Creek Creamery," in a rural community in Black Hawk county, and he took the jug containing the acid to his said creamery, and placed it upon a shelf in one of the rooms thereof. It was the custom at this creamery to put buttermilk in jugs similar to the one in which the acid was placed, for the

use of customers and employés of the creamery, who were invited and permitted to drink the milk placed therein. Harry O. Burk, plaintiff's minor son, who was then seventeen years of age, was lawfully at the creamery on the 9th day of February, 1903, and seeing the jug containing the acid, asked an employé at the creamery if he could have a drink of buttermilk. The employé, not knowing that the boy had his eye on the sulphuric acid jug, but supposing that he was referring to another close at hand which did contain buttermilk, told him that he could, and invited him to drink of the milk. Burk went to the jug containing the acid, and, supposing that it contained buttermilk, drank therefrom, and, as a result thereof, died the next day. The acid was taken about two o'clock in the afternoon of a bright day, and the room in which the jug was kept was well lighted. Burk's eyesight was good, and he could easily have seen a label had one been placed upon the jug. Creameries universally use sulphuric acid for the purpose of testing milk and cream for butter fat, and this the defendant company well knew. The jug containing the acid was a little larger than the buttermilk jug, but both were one-gallon white jugs, and there was nothing in general appearances to distinguish one from the other. Defendant knew that it was the custom of all creameries to provide buttermilk for people to drink, and that patrons thereof carried the same away for use at their homes.

Code, section 4976, provides, in substance, that if any person deliver to another any poisonous liquor or substance without having the word "poison," and the true name thereof, written or printed upon a label attached to or affixed upon the vial, box, or parcel containing the same, he shall be guilty of a misdemeanor. And sections 2588 and 2593 also prohibit the sale of poisons, except that the same be labeled as therein required. Violation of such statutes is universally held

1. SALE OF POISON: negligence.

to be negligence. *Ives v. Weldon*, 114 Iowa, 476, and cases cited.

But defendant contends that this negligence was not the proximate cause of the injury to the plaintiff's son. It was, of course, incumbent upon the plaintiff to show, not only a violation of one or the other of these sections of the Code, but also that such violation was the proximate cause of the injury and death of his son. That matter was submitted to the jury under proper instructions, and it found for the plaintiff on this issue.

2. PROXIMATE
CAUSE OF
DEATH.

But it is said that Riedel, the owner of the creamery, was also guilty of negligence in placing the jug in the creamery at the place he did, that this negligence was the approximate cause of the injury to plaintiff's son, and that the defendant had no reason to apprehend or anticipate any negligence on the part of the purchaser of the acid. As said in the *Ives Case*, *supra*, these statutes were made for the protection of all persons in the State, and to warn all that the substance they are handling is dangerous, and that its use requires constant care. Defendant, as we have said, knew of the custom which prevailed among creameries, knew that buttermilk is kept there for the use of patrons, and that sulphuric acid is used in all creameries. It knew, or should have known, that any one lawfully about the creamery was likely to pick up this jug, and to use the same for any legitimate purpose. It owed a duty to any one who might rightfully handle or use the jug in the ordinary, usual, or customary manner. This jug had to be kept about the creamery, and there was no statutory or other obligation on the part of the creamery owner to keep it under lock and key. Of course, if he knew that it was not labeled, or by the use of ordinary care should have known of that fact, he would be required, on account of the dangerous character of the acid, to use due care to protect all persons who might rightfully come in contact

3. INTERVENING
NEGLECT.

therewith. But failure on the part of the purchaser to do this would not necessarily excuse the vender for his violation of law.

But defendant insists that it had no reason to anticipate the wrongful or negligent acts of the manager of the creamery, and that it is for that reason not liable for the consequences thereof. While there are some loose

4. NEGLIGENCE.

expressions in the books to the effect that one is not liable for negligence unless the results of his acts might reasonably have been foreseen by him, the true doctrine, as we understand it, is that it is not necessary to a defendant's liability that the consequences of his negligence should have been foreseen. It is sufficient if the injuries are the natural, though not the necessary or inevitable, result of the wrong; such injuries as are likely, under ordinary circumstances, to ensue from the act or omission in question. The test, after all, is, would ordinary prudence have suggested to the person sought to be charged with negligence that his act or omission would probably result in injury to some one? The particular result need not be such as that it should have been foreseen. *Palmer v. R. R. Co.*, 124 Iowa, 424; *Hazzard v. City*, 79 Iowa, 106; *Doyle v. R. R. Co.*, 77 Iowa, 607; *Osborne v. Van Dyke*, 113 Iowa, 557. In applying this doctrine to cases where there is an intervening agency, it is generally held that the intervening act of an independent voluntary agent does not arrest causation, nor relieve the person doing the first wrong from the consequences thereof, if such intervening act was one which would ordinarily be expected to flow from the act of the first wrongdoer. *Lane v. Atlantic*, 111 Mass. 136.

Where several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have hap-

5. PROXIMATE CAUSE.

pened. These rules have full support in our cases. *Walrod v. Webster Co.*, 110 Iowa, 349; *Harvey v. Clarinda*, 111 Iowa, 528; *Buehner v. Creamery Co.*, 124 Iowa, 445; *Palmer v. R. R. Co.*, 124 Iowa, 424; *Gould v. Schermer*, 101 Iowa, 582; *Liming v. R. R. Co.*, 81 Iowa, 246; *Schnee v. City*, 122 Iowa, 459; *Ives v. Weldon*, *supra*.

Referring now to the facts. The jury was fully justified in finding that but for defendant's act or omission the accident in question would not have happened. Under the testimony, the injury to plaintiff's son might well have been found to be the direct and proximate result of defendant's failure to label the jug containing the poison. Had it been labeled, the accident would not have happened, even though the managers of the creamery may have been negligent in placing it where they did. Moreover, had it been properly labeled, the jury might well have concluded that there would have been no negligence on the part of the creamery managers in placing it where they did.

The direction to plaintiff's son to drink out of a jug was not of itself negligence. The person giving the permission did not know that the boy had in mind the jug containing the acid, and there is nothing to show

6. NEGLIGENCE.

that this person even knew there was a jug there containing acid. It was a question for the jury, under proper instructions, to determine whether or not defendant's negligence was the proximate cause of the accident. See cases hitherto cited. The instructions given by the trial court on that subject were correct, and with the finding of the jury thereunder we are not disposed to interfere.

The defendant might reasonably have foreseen that its act or omission was likely to cause injury to some one who might rightfully handle the jug, and it is not enough for it to say that it could not reasonably have foreseen the exact mishap. None of the cases cited and relied upon by appellant announce a contrary doctrine, although in some of

them expressions are used which, in a measure at least, give color to its propositions. With reference to these, and to all other cases bearing upon the subject, it may be said that no one has as yet given a very satisfactory definition of proximate cause. Indeed, one must of necessity look to practical distinctions on this subject, rather than to merely academic or theoretical ones, and, after all is said, each case must be decided largely on the special facts belonging to it. At most, the act of Riedel was a concurring and co-operating fault, and not in itself the producing cause of the injury. ✓

II. Contributory negligence on the part of plaintiff's son is said to have been affirmatively shown by the testimony. We do not think so. This question, like the other, was for the jury, and with its conclusion on this subject we are content.

III. In referring to the matters which plaintiff should prove in order to be entitled to a verdict, the court used the term "proximate cause," without otherwise defining it.

This is complained of. The complaint is without merit. *Theissen v. Belle Plaine*, 81 Iowa, 118; *Miller v. Boone County*, 95 Iowa, 5.

Were it otherwise, we should find that the matter was fully covered in subsequent instructions, notably the twelfth.

IV. In another instruction the court said, in effect, that the fact that Riedel and another employé of the creamery knew the jug contained sulphuric acid would not, as respects the issues in the case, relieve the defendant

from the charge of negligence, provided the defendant sold and delivered the acid without

complying with the statutes. It is contended that this removed the doctrine of proximate cause from the case. This is incorrect. The instruction is good as far as it went, and the question of proximate cause was fully and correctly covered by other instructions. In other words, the negligence of the owner or manager of the creamery would not relieve defendant from the charge of negligence, provided the jury

7. INSTRUCTION:
proximate.
cause.

8. SAME.

found that defendant's negligence was the proximate cause of the accident. That instructions must be taken and construed together is fundamental, and, when that is done in this case, there is no error of which defendant may justly complain.

Another instruction with reference to Burk's conduct in drinking out of the jug, in its bearing upon the question of contributory negligence, is complained of. It left to the jury the question of Burk's conduct in this respect, in view of the statement made to him by the employé of the creamery when he asked for permission to drink, for it to determine whether or not he acted with reasonable prudence and care in drinking from the jug in the manner shown. There was no error in this. It did not, as defendant contends, take from the jury the question of proximate cause.

The twelfth instruction, with reference to proximate cause, is also challenged. It announces the rules heretofore stated in this opinion clearly and distinctly, and we need not set it out *in extenso*.

(The principal point in the case is the doctrine of proximate cause as applied to the facts disclosed by the record. We think there was sufficient testimony to take the case to the jury on this proposition.

There is no error in the record, and the judgment is *affirmed*.

FRED PLAGGE v. DICK MENSING, Appellant.

Drainage: DAMAGE: INSUFFICIENCY OF EVIDENCE. The owner of
 I lower land cannot restrain the owner above him from tiling his open ditches, on the theory simply that the location of the tile below the surface would drain a greater area more rapidly and carry additional water onto plaintiff's land which otherwise would evaporate or be absorbed, in the absence of evidence showing that the tiling increased the flow and caused actual damage. Evidence reviewed and fails to show an increased injury.

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Defective record: costs. Although an abstract is not so defective
2 that a motion to affirm or strike should be sustained, still where
the questions and answers are needlessly set out the cost of
printing may be taxed to appellant on reversal.

Appeal from Franklin District Court.—HON. J. H. RICH-
ARD, Judge.

THURSDAY, MARCH 9, 1905.

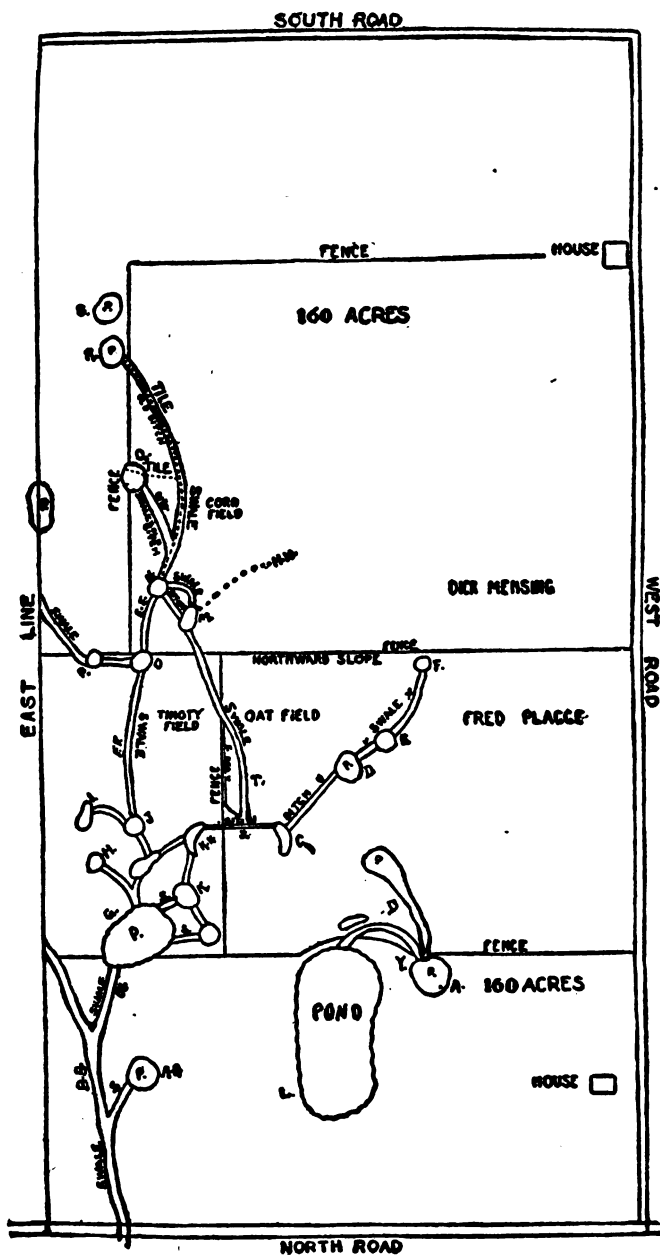
ACTION to enjoin the defendant from maintaining cer-
tain drains in his land. Decree as prayed, and defendant
appeals.—*Reversed.*

Taylor & Evans, for appellant.

E. P. Andrews, for appellee.

LADD, J.—The defendant is owner of the southwest
quarter and the plaintiff the northwest quarter of the same
section of land. The natural drainage of both farms is
toward the north. In the fall of 1901 defend-
ant laid three-inch tile from the pond R to 2,
and also from the pond Q to 2, on the accom-
panying map, and five-inch tiling from 2 to N. He also
excavated a straight ditch from the pond N to M, and laid
three-inch tile from the pond M to H H. Some witnesses
testified that the pond S was drained into the R, but this
was a mistake, as the tiling of that was to the southwest.
The complaint is that the result of this tiling was to cast
more water than formerly upon the plaintiff's land and flood
it. The evidence fails to sustain this claim. Prior to the
laying of the tile there was a ditch or depression along which
the water passed from R to N; also a ditch or swale from

1. DRAINAGE:
damage; in-
sufficiency
of evidence.



Q to N. There is some discrepancy in the record as to the extent of the ponds R and Q, plaintiff's witnesses evidently including somewhat of the territory drained by each and sometimes under water, and those of defendant estimating only the portions filled with water after drained by the old ditches. No doubt the water covered considerable ground at times, but we are satisfied that neither pond covered to exceed an area of three or four rods square, with water sixteen inches deep at the lowest place when it ceased to run off through the ditches. Even this water disappeared in dry weather. The swale extended from N, over the plaintiff's land and that of another, to a creek into which it emptied. Before it passed down E E from N to the large pond, G, however, it filled N by passing through a depression, and the water in this latter pond, when it overflowed, went down the swale, T, to the pond G. Whether H H was a pond is uncertain, but we are inclined to think that water sometimes stood there, and that there was somewhat of a depression from H H to M. How much water flowed through this drain, and whether the tile materially increased it, we have no means of knowing. The pond N is between ten and twenty rods, and M five rods, from the division line. Below these to the north, on plaintiff's land, are a number of small ponds and the large one previously mentioned.

The plaintiff estimates that the water from defendant's land flooded two and one-half acres before the tiles were laid, and covered five acres in 1903. The renter in possession testified that there were one and one-half acres of oats he could not cut with the harvester, but mowed, and that he had trouble to cut two to two and one-half acres of timothy; that some of it he could not reach to haul away. The evidence shows conclusively that the crops on this five acres had suffered more or less from having too much water in former years, and that 1902 was an unusually wet season. The excessive rainfalls fully explain the condition of plaintiff's land, and evidence is practically undisputed that it

was merely affected like other portions of the same farm lands in the vicinity. We can discover no ground for saying that more water flowed upon it to its injury as a result of laying the tiles, unless we accept certain theories on which the trial judge seems to have based the decree. As stated, the tiles were laid in the line of the old ditches, and the court found: (1) That these would carry water which would otherwise have stood in the pond and been evaporated and absorbed by the earth; (2) that the tiling, being located below the surface, would drain the water from a wider area than the ditch; and (3) that it would carry the water off more rapidly. Theoretically this may be correct, but the record contains nothing to indicate how much more rapidly drainage would be effected through the tiles than in the open ditches, or how much less water would have been collected, or how much more water would be taken up by way of absorption or evaporation, had the tiling not been laid. While there was testimony that tiling would drain the land more quickly than ditches, it does not appear that the water will flow more rapidly or for a shorter period from the lower end of the tiling than it did from the ditch. As the tiling drains the earth, the water reaches it shortly after rain begins to fall, while it may not flow in the shallow ditch until the soil is filled to the surface. After the water which would stand in the small ponds had once been drained by the tiling, the only difference as to these would be that effected by evaporation and absorption, which, of course, would go on in ponds M and N. There were no measurements indicating differences in elevations, and, though the depth of the drain may determine the area which will be drained thereby, this necessarily depends somewhat on the nature of the soil and topography of the country.

Enough has been said to indicate our opinion that the issue as to whether the laying of these drains worked substantial injury to plaintiff was a matter of proof, and not to be deduced from mere theory. The court concluded that,

as defendant's land is now dry at all times, even though plaintiff's was naturally wet and 1902 an unusually wet season, and that it "may be said not to be conclusively established that the difference in the drainage noted was the direct and immediate cause of the damage claimed by plaintiff in his testimony," yet "that the natural and ordinary result of the system of drainage put in by defendant would be to produce the wetter condition of plaintiff's land, and that, if any presumption is to be indulged in, it is in favor of the plaintiff, and against the defendant, as to that. It also appears that the result actually did take place, that is, that plaintiff's land was wetter in a wet time, and at such places and under such circumstances that it could have been caused directly by the tiling or drainage complained of by plaintiff."

Surface water is a common enemy, and the owner of land has the right to fight it in any possible way he may choose, provided he does so without working injury to his neighbor. If, instead of allowing the water to flow along its natural course to collect in ponds, he caused it to pass through a ditch or tile into another pond, all on his own land, no presumption is to be indulged that this will result in injury to the servient estate. Controversies of this kind must be determined from the evidence presented, and not upon mere theories as to the probable effect of draining by tiles instead of ditches, on the quantity of water cast on another's land or the manner in which this is done. That injury might have resulted from defendant's drains is not enough. The burden of proof was on plaintiff to show, as a basis of the relief asked, that these did in some way render the land less valuable for some purposes than before. He failed to do so. The only witness who testified as an expert thought the change would not affect the flow of water from the ponds N and M over the division line. Because of the failure to prove either a change or increase of the flow of water from defendant's land on that of plaintiff as a result of the tiling,

the writ of injunction should have been denied. See *Collins v. Keokuk*, 91 Iowa, 293; *Dorr v. Simerson*, 73 Iowa, 89.

The abstract is not so defective that the motion to affirm or to strike should be sustained. It is not, however, in compliance with the rules, as in large part it unnecessarily sets out the questions and answers, and, owing to this violation, the costs of printing the same will be taxed to appellant.—*Reversed*.

IOWA DEPOSIT AND LOAN COMPANY, Appellant, v. GEORGE W. MATTHEWS, ET AL.

Building and loan mortgages: FORECLOSURE: COMPUTATION: JUDGMENT. In construing Code, section 1898, relative to the foreclosure of a building and loan association mortgage, it is held that in computing the sum for which judgment should be entered, the borrower should be charged with the net amount of the loan received by him, together with twelve per cent. interest per annum thereon, and he should be credited with the full amount paid by him as dues, fees, fines, premiums, and interest, and judgment should be rendered for the difference, if any; but if the payments exceed the net amount of the loan, and interest then the association is not entitled to judgment. Weaver, J., dissenting.

Appeal from Taylor District Court.—HON. R. L. PARRISH, Judge.

FRIDAY, MARCH 10, 1905.

THE plaintiff is a building and loan association, and brings this suit in equity to foreclose a mortgage executed to it by Matthews and wife to secure a loan of \$500 made to Matthews. There was a judgment for the defendants, and the plaintiff appeals.

Geo. E. Hise and Flick & Jackson, for appellant.

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Haddock & Sons, for appellees.

SHERWIN, C. J.—At the time the loan was made, Matthews was the holder of five shares of the capital stock of the plaintiff, upon which he had agreed to pay the sum of sixty cents per share per month. He executed his note for \$500, and agreed therein to pay the monthly dues on his stock, \$3 per month as premium, and \$2.50 per month as interest. When suit was commenced, in March, 1901, the defendants were delinquent \$27 for nine months' dues, \$27 for nine months' premium, and \$22.50 for nine months' interest, making the total delinquencies \$83.25. The withdrawal value of the stock was then \$380.33.

The plaintiff's claim against the defendant was stated thus:

| | |
|--------------------------------|----------|
| Amount of the loan..... | \$500 00 |
| Delinquent dues | 27 00 |
| “ premium | 27 00 |
| “ interest | 22 50 |
| “ fines | 6 75 |
| <hr/> | |
| Loan and delinquencies..... | \$583 25 |
| Withdrawal value of stock..... | 380 33 |
| <hr/> | |
| Balance due the plaintiff..... | \$202.92 |

This statement of account is in exact accord with a provision of the statute, Code, section 1898, which, so far as material to the question under consideration, is as follows:

In case of foreclosure the borrower shall be charged with the full amount of the loan made to him, together with the dues, interest, premium, and fines, for which he shall be delinquent, and he shall be credited with the same value of his pledge shares as if he had voluntarily withdrawn the same. In the event judgment is obtained against a borrower of a building and loan association, no greater recovery

shall be had than the net amount of principal actually received, with interest thereon at a rate not greater than twelve per centum on the amount of loan actually received by, and paid to borrower with statutory attorney's fees; no evasion of this provision shall be had by means of any dues, membership fees, premiums, fines, forfeitures or other charges, any agreement to the contrary notwithstanding.

The balance shown by the appellant's statement of account would be the amount it should recover, were it not for the provision of the section limiting the amount of recovery where a judgment is obtained. It is a fundamental rule of construction that a statute on a particular subject must be construed as a whole, and that effect must be given to all of the language thereof, if possible. The first provision of the statute under consideration relates alone to the foreclosure of the mortgage executed by the borrowing stockholder, and provides the method of determining the amount with which he may be charged in the event of a foreclosure of the mortgage, and were it not for the second provision, which limits the amount of the judgment which may be rendered against him upon a foreclosure, there would be no difficulty in determining the amount which the plaintiff would be entitled to recover in any given case. But this clause of the statute expressly limits the amount which may be recovered, in the event the foreclosure proceeds to a judgment, to the net amount of the principal actually received, with interest thereon at twelve per cent. per annum; and the further provision is, in effect, that, in determining whether the rate of interest which has been paid or will be paid by the borrower in the event of a judgment against him, all payments made to the association by him shall be considered — that it, the sum total paid by him in dues, premiums, interests, fines, forfeitures, or other charges — shall enter into the computation in determining the rate of interest paid. When, therefore, a foreclosure proceeds to a judgment, the first requisite under this clause of the statute is to ascertain the net amount

of the principal actually received by the borrower, and what the interest thereon would be up to the date of the judgment, at twelve per cent. per annum, for by the terms of the statute the association can by no possibility recover a greater sum than those two items aggregate.

The next inquiry is to determine the total amount paid by the borrower to the association in connection with the loan, and in determining this, where a charge is made by the association for delinquencies under the first clause of the statute, it is manifest that the charge for such delinquencies must be considered as an actual payment, because, in the event of a judgment against the borrower, it would amount to the same thing. Having determined these two amounts — that is, the total amount of the principal received and interest thereon at twelve per cent., and the total amount of the payments actually made and delinquencies charged — the next step is purely mathematical. If the latter amount equals or exceeds the former, the statutory limit has been reached, and the plaintiff is not entitled to a judgment for more; but if the latter amount does not equal the former, the plaintiff may recover the difference, if it is due it under its contract with the borrower. An illustration, with the figures in this case, may be of assistance in making clear our meaning. The net amount of the loan actually received by the defendants, as shown by the record, was \$467.45. Interest on this sum at the time of the trial, as computed by counsel, was \$570.07. The total of the two sums is \$1,037.52, which represents the limit of plaintiff's recovery under the statute. The defendants have paid to the association, in dues, interest, and premiums, the aggregate sum of \$745.50, and in the statement of plaintiff's account, as we have heretofore seen, they are chargeable with the further sum of \$83.25 for delinquencies, which sum, added to the amount already paid, makes a total sum paid and charged on account of the items enumerated by the statute of \$837.75, which sum represents the exact amount

that the defendants would have paid had there been no delinquencies. It is \$199.77 less than the aggregate amount of the net principal received, with twelve per cent. interest thereon, and hence the statutory limit has not been exceeded by the payments made in this case. It must be borne in mind that the computation under the last clause of the statute is for the purpose only of ascertaining the limit of the plaintiff's judgment. Returning again to the plaintiff's statement of account under the first clause of the statute, we find that it claims \$202.92, which is \$3.15 in excess of the amount which it may recover.

This conclusion gives force and effect to both provisions of the statute, and is not inconsistent with either. The statute gives to associations of this kind the right to exact a greater rate of interest than is allowed to other lenders; it permits them to assess and collect from members such dues, membership fees, fines, premiums, and interest on loans as may be authorized by their articles of incorporation and by-laws, and expressly says that the same shall not be held to be usurious. But an interest limitation is also fixed, beyond which the association may not go, and which the courts shall not permit it to evade by any of the means named; the right, however, to assess and collect up to this point is unlimited, if the articles so provide.

The plaintiff's claim was founded upon the provisions of section 1898, and the proper construction of the limitation provision thereof seems to have been the only question before the trial court. We will not therefore consider the question, suggested in argument here, that its application in this case will interfere with vested rights.

In *Bacon v. Iowa Savings & Loan Ass'n*, 121 Iowa, 449, the proper construction of the last clause of the statute under consideration was not argued. On the contrary, it was contended that it was not applicable to that case, and the computation contended for by the appellant therein, under the limitation clause, was not controverted. The rule there

announced for ascertaining the rate of interest paid, so far as it goes, is in harmony with our holding here, although, in the discussion of the particular facts involved there, the opinion seems to limit the computation to the interest and premium paid and delinquent, instead of taking into consideration all payments. Such was not the intention, however.

In *Briggs v. Iowa S. & L. Ass'n*, 114 Iowa, 232, the question under consideration was not directly involved. It was there claimed that the plaintiffs were entitled to the withdrawal value of their shares, and also to dues and premiums paid, and we held that they were not entitled to credit for such items, following the holding in *Iowa Deposit & Loan Co. v. Timme* (Iowa), 85 N. W. Rep. 820, and *Spinney v. Miller*, 114 Iowa, 210. To the same effect is the holding in *Iowa B. & L. Ass'n v. Vogt*, 115 Iowa, 59.

Nor do we now hold that the borrower is entitled to them as distinctive credits, or at all, unless the sum total of his payments shall exceed the amount of principal actually accrued and the statutory interest, in which event he is entitled to have deducted only the excess over such amount. If the total amount paid by him does not exceed this limit, he is entitled to no reduction, and consequently to no credit for such items.

The difference between the face of the loan and the amount actually received by the defendants seems to have been deducted for the expense of closing the loan and for the advance payment of dues, and these charges, it is contended, are allowed by the statute, and by the contract between the parties; and this is true, except when it is necessary to determine whether excessive interest has been paid, in which event the statute expressly says that there shall be no evasion of the rule by means of any charges, and interest shall be computed "on the net amount of loan actually received by and paid to borrower."

In determining whether the interest limit has been ex-

ceeded, the rule of partial payments adopted in *Hunter v. Doolittle*, 3 G. Greene, 76 (54 Am. Dec. 489), and in *Smith, Twogood & Co. v. Coopers & Clark*, 9 Iowa, 376, should not obtain. Section 1898 expressly provides that monthly payments of interest, dues, and premiums may be made, and the limitation provision does not, in terms or by implication, say that they shall be treated as partial payments.

In determining whether an excess of interest has been paid, we are not dealing with specific payments which have been made upon the loan, as would be the case were we ascertaining the amount due upon an ordinary promissory note. The statute fixes the borrower's credits in cases of foreclosure, and, as we have seen, these are the only credits to which he is entitled, unless the gross amount paid by him gives the association more than twelve per cent. on his loan, and this is to be determined at the time the judgment is rendered. As we have heretofore said herein, and held in other cases, the dues, premiums, etc., are not to be treated as credits to which the borrower is entitled in the settlement of his loan; and, if this be true, they certainly cannot be treated as partial payments, and credits be given therefor on the principal debt for the purpose of ascertaining the per cent. of interest actually paid.

Furthermore, when the borrower pays according to the terms of his contract, he receives the benefit of the money so paid in the increased withdrawal value of his stock; and if, when judgment is rendered, he may have a part of such payments applied on his principal debt as of the date when made, he receives interest on money which has been applied to reduce such debt. Of course, this result would not obtain if the withdrawal value of his stock was not enhanced by the earnings of the money so paid. *Iowa Deposit Co. v. Timme*, *supra*; *Bacon v. Association*, *supra*; Eubbich on Building Associations, section 477; *Seibel v. Ass'n*, 43 Ohio St. 371 (2 N. E. Rep. 417); *Tilley v. Ass'n* (C. C.), 52 Fed. 618; *Reeve v. Ass'n*, 56 Ark. 335 (19 S. W. Rep. 917; 18 L. R.

A. 129); Thompson on Building Associations, 429, 545; *Briggs v. Ass'n*, 114 Iowa, 232; *Hale v. Kline*, 113 Iowa, 523.

The case is reversed, and remanded for a decree in harmony with this opinion, or the plaintiff may, if it so elects, have a decree in this court.—*Reversed*.

WEAVER, J. (dissenting).—The statute in unequivocal language, provides that in actions upon building and loan contracts no greater recovery shall be had against the borrower "than the net amount actually received with interest thereon at a rate not greater than twelve per centum per annum on the amount of loan actually received by and paid to the borrower with statutory attorney's fees. No evasion of this provision shall be had by means of any dues, membership fees, premiums, fines, forfeitures or other charges, any agreement to the contrary notwithstanding." Observing its terms, we have the simple question whether the payments of all kinds made by the borrower to the association equal or exceed a sum which would be sufficient to return to such association the money actually loaned by it, with interest at twelve per cent. per annum. If so, no further recovery can be had, notwithstanding any stipulation in the contract to the contrary; but if insufficient, the association may recover all the various installments and charges provided for in the contract up to, but not beyond, the limit thus fixed. In short, the statute provides a standard of comparison by which we may determine when the premiums, dues, fines, forfeitures, and other charges shall be held to be excessive. Creditors in general are by statute prohibited from contracting for more than eight per cent. interest. Code, section 3038. But building and loan associations are permitted to disguise usury under the more attractive garb of "premiums," "dues," "fines," and "other charges," and to enforce payment thereof so long as the sum total of the exactions shall not be greater than interest at the rate of

twelve per cent. per annum. Whenever, then, any question arises whether the demand of the association is greater than it is lawfully entitled to recover, we have only to test it by the standard thus provided. That is, we are to compare the amount which is necessary to discharge the debt on the contract basis of premiums, dues, fines, and other charges with the sum or result which would have been found had the loan been made at "twelve per cent. interest per annum," and all the various contributions to premiums, dues, fines, and other charges had been applied as payments.

The words "interest," "rate," and "per cent. per annum," as applied to compensation for the use of money, have long had a fixed and settled meaning in law, and the rule for computing interest is agreed to with practical unanimity by all courts in all the States, including our own. See *Smith v. Coopers*, 9 Iowa, 387, and the many cases to same effect collected in 29 American Digest, page 230. By this rule the creditor is always and everywhere required to account for all payments as of the date when they are received, and, if such payments at any time exceed the interest then earned, they operate to reduce the principal debt by the amount of such excess, and in the same proportion reduce the burden of interest thereafter accruing. If the Legislature had not intended its language to be interpreted in harmony with the accepted rule of law, which accords as well with common and approved usage, surely we should have been given some explicit direction to that effect. Under the rule adopted by the majority, the association is permitted to swell the standard of comparison by computing interest on the entire amount of the original loan for the entire time from the date of the contract to the date of settlement, and from the sum of these items the aggregate amount of all partial payments, without interest, is then deducted. In other words, the debtor is thus made to pay not only the given rate of interest on the unpaid balance of principal, but also upon the very money which he has repaid and of which

the creditor is enjoying the use and benefit. Applied to cases like the one at bar, it abolishes the statutory provision that no greater recovery shall be allowed than the sum actually loaned, with interest thereon at a rate not greater than twelve per cent. per annum, and substitutes for such limit another, by which the association may increase the sum of its exactions to the amount which shall be the equivalent of interest at the rate of 15 to 20 per cent. per annum. To illustrate its practical effect, let us suppose that A. owes B. \$500, bearing interest at twelve per cent., and he pays each year for four successive years a sum equal to the accrued interest and one-fifth of the principal. If settlement be had at the end of the fifth year, according to the standard rule, it is obvious, without formal statement of the figures, that the utmost sum required of the debtor to cancel his obligation is \$112. But applying the rule of the majority opinion, we have an account like this:

| | |
|--------------------------|----------|
| Principal | \$500 00 |
| Interest (5 years) | 300 00 |
| | <hr/> |
| Total | \$800 00 |

Less Payments: .

| | |
|-------------------|----------|
| First year | \$160 00 |
| Second year | 148 00 |
| Third year | 136 00 |
| Fourth year | 124 00 |
| | <hr/> |
| | 568 00 |

| | |
|--------------------------------|----------|
| Balance due (fifth year) | \$232 00 |
|--------------------------------|----------|

By this plan the debtor is compelled to pay \$232 to discharge a debt which by the ordinary rule of computation would amount to but \$112. Now, by the first method the creditor gets full twelve per cent. interest per annum. There is never an instant when every dollar lent by him and not

returned into his hands is not earning him interest at that rate. By the second method he received his full twelve per cent. interest as above shown, and a bonus or excess of \$120. Stated in terms of "interest," he receives the equivalent of twenty per cent. per annum on his money for the time it was actually out of his possession. It cannot be reasonably supposed that, in restricting building and loan associations to charges which shall not exceed the equivalent of twelve per cent. per annum, the Legislature had any thought that it was legalizing a scheme for the exaction of twenty per cent. Assuming, as we must under the former holdings of this court, that the statute which excuses these associations from obedience to the general law against usury is a valid exercise of legislative power, every consideration of justice and public policy required us to construe this extraordinary and exceptional grant or privilege with strictness, and to confine its exercise within the limits prescribed for it.

To a great extent, building and loan associations have ceased to be the simple co-operative enterprises by which laborers and others of limited income co-operate in bringing together their modest savings and making them the instrument or means by which homes are built and the general prosperity advanced, and have become devices by which excessive interest is obtained, with few, if any, counterbalancing advantages. Says the Supreme Court of Pennsylvania: "It is well known that the design of the Legislature was to encourage the erection of buildings. The motive for the grant of the franchise was public improvement. But the practical working of the associations formed under the law has not been what was anticipated. Though called 'building societies,' they are in truth only agencies by which greater than legal interest is obtained from the necessitous and unwary." These obvious truths have led the courts quite generally to construe the statutes authorizing the business with strictness, and to apply to their contracts the ordinary rule for computing interest where partial payments are to be con-

sidered, unless some other method is clearly authorized. *N. A. Building Ass'n v. Sutton*, 35 Pa. 463 (78 Am. Dec. 349); *Kupfert v. B. & L. Ass'n*, 30 Pa. 469; *Mills v. B. & L. Ass'n*, 75 N. C. 292; *Western S. Co. v. Houston*, 38 Or. 377 (65 Pac. Rep. 611); *Strauss v. Carolina B. & L.*, 117 N. C. 308 (23 S. E. Rep. 450; 30 L. R. A. 693; 53 Am. St. Rep. 585).

It would be profitless to go into a minute computation of the payments in this case. They are made up of numerous small sums paid at monthly intervals covering a period of several years. Considered on the basis for which I here contend, the association has already received the full equivalent of the original loan with interest at twelve per cent. per annum, and is entitled to no more.

In my opinion, there is no merit in the appeal, and the decree of the district court should be *affirmed*.

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ABANDONMENT

TO

ACQUIESCENCE

ABANDONMENT.

Forfeiture: Evidence. In an action to declare a forfeiture of coal mining lease on the ground of abandonment, the evidence is reviewed and held to sustain the finding of the trial court that the failure to continuously operate the mine, under the circumstances shown, was insufficient to authorize a forfeiture. *Price v. Black*, 304.

ABSTRACT.

Appeal. It does not necessarily follow from the fact that the cross-examination of certain witnesses does not appear in appellant's abstract, that the same does not contain the substance of the evidence as required to be set out; this objection should be met by an amended or additional abstract. *Wolf v. Elevator Co.*, 659.

Defective record: Cost. Although an abstract is not so defective that a motion to affirm or strike should be sustained, still where the questions and answers are needlessly set out the cost of printing may be taxed to appellant on reversal.

ACCOUNTING.

Redemption from mortgage foreclosure: Equity. A mortgagor whose property has been sold on foreclosure, or his assignee, may maintain an equitable action to redeem if brought prior to the expiration of the statutory period of redemption, and where possession has been taken by the holder of the certificate of sale without assent he may have an accounting of the rents and profits and of any portion of the property converted by the certificate holder to his own use, for the purpose of ascertaining the amount required to make redemption. *Dolan v. Blast Furnace Co.*, 254.

ACQUIESCENCE.

The fact that plaintiff's team was not upon a public street when frightened by defendant's negligent use of an engine, did not affect his liability for an injury resulting therefrom, it appear-

ACQUIESCENCE Continued

TO

ADMINISTRATORS

ing that plaintiff was not a trespasser but upon a traveled way the use of which defendant had acquiesced in. *Wolf v. Elevator Co.*, 659.

ACTIONS.

Dismissal of actions: Ratification: Estoppel. The denial of a count of the petition, tender of the amount claimed and offer to confess judgment therefor, which are refused, will not preclude the right of plaintiff to dismiss as to that count at any time before judgment; nor will it amount to a ratification or work an estoppel. *Continental Insurance Co. v. Clark & Cressler*, 274.

Equitable Relief. Where a suit in equity by a vendee of real property for specific performance and one at law to rescind the contract are pending at the same time, the court may proceed to determine the material issues in the equity suit regardless of which action was brought first. *Clinton v. Shugart*, 179.

Husband and wife. Where a wife loans her husband money from her separate estate, taking his note therefor, she has a right under Code, section 3155, to maintain an action on the same against him during coverture. *In re Estate of Deaner*, 701.

Recovery of rents and profits by junior mortgagee. A junior mortgagee or his assignee, whose rights have not been foreclosed, may redeem from the foreclosure of a prior mortgage and recover the rents and profits less permanent improvements if any, but such rents must be determined and recovered in the action for redemption and not by a separate suit, unless a sufficient excuse for the failure be shown. *Meredith v. Lochrie*, 596.

Recovery of public funds: Suit by citizen: Demand that official sue. A citizen and taxpayer cannot maintain a suit to recover funds of a city alleged to have been misappropriated, without first demanding of the proper officers that suit be brought, or a showing that such demand would have been unavailing. *Reed v. Cunningham*, 302.

Temporary injunction: Action on bond. A right of action upon a bond given for the issuance of a temporary writ of injunction, will not lie until the main action has been determined. *Lacey v. Davis*, 675.

ADJUDICATION. See JUDGMENTS.

ADMINISTRATORS. See ESTATES OF DECEDENTS.

Discharge: Infant claimants: Equitable relief. The mere fact of infancy will not authorize a court of equity to set aside

ADMINISTRATORS Continued

TO

ADVERSE POSSESSION

an order discharging an administrator to permit the filing of a claim against the estate which is barred by the statute. *Boyle v. Boyle*, 167.

ADMISSIONS. See EVIDENCE.

A deliberate written statement over a party's own signature inconsistent with a subsequent claim is provable not merely to discredit his testimony but as substantive proof against him and is not subject to the rule governing verbal admissions. *Castner v. Railway Co.*, 581.

Impeachment. Where an engineer had testified that he did not sound the whistle, and denied on cross-examination that at a certain time and place and in the presence of certain persons he stated that he did give the signal, it was competent to show that he made the latter statement, not as an admission binding upon the company but for impeachment purposes. *Gregory v. Railway Co.*, 230.

Instructions. Where there is both oral and written evidence of an admission, an instruction in relation to the weight to be given the same should point out the distinction between the two forms of proof; and where the jury is told that oral evidence of an admission should be received with caution, they should also be instructed that when the admission is clearly identified such evidence is often of a satisfactory nature. *Castner v. Railway Co.*, 581.

Proof of admissions. In an action against a railway company for damage caused by fire, it is competent to permit plaintiff to testify that a letter written by him to the company definitely stating the amount of his claim was in fact written to secure a compromise and not intended as an accurate statement of his damage, as affecting its weight as an admission. *Idem.*

ADVANCEMENTS.

Trusts: Pleadings. As between parent and child a conveyance of real property is presumed to be an advancement, but this presumption may be overcome by clear and satisfactory proof showing a trust; but to admit proof of a trust the facts relied upon must be pleaded. *Hoon v. Hoon*, 391.

ADVERSE POSSESSION.

Laches: Estoppel. Where one under a quit-claim deed from the supposed owners of the swamp land title, has in good faith entered upon the land, improved and occupied it for a period of ten years, a railway company in fact owning the

ADVERSE POSSESSION Continued

TO

AGENCY

same but having neglected for more than ten years to procure a patent or assert its rights, knowing of the adverse claim and occupancy, is estopped by its laches from thereafter claiming the land. *Iowa Railroad Land Co. v. Fehring*, 1

ADVERSE USER.

Easement. The act of one landowner in filling a highway ditch carrying water from the land of an adjacent owner onto his own, when done within the period of limitation, will defeat the claim of easement growing out of adverse user. *Schofield v. Cooper*, 334.

AGENCY.

Brokerage agency: Transfer. The contract of a real estate agent to transfer to another a list of properties which he has for sale on commission that such other may arrange terms of sale with the owners, is not a transfer of the agency and therefore not objectionable on that ground. *Roush v. Gesman Bros. & Grant*, 493.

Commissions: Division Between Agents: Evidence: Verdict. In an action between real estate agents for a division of commissions on the sale of farms turned over by the plaintiff to defendants, the court charged that the plaintiff could not recover for the sale by defendants of lands not listed with him by the owner, but in view of the evidence that a son of the owner of a certain farm was authorized to list the same and in fact listed it with plaintiff, the verdict including a commission for the sale thereof is sustained. *Idem*.

Contract for the sale of land. Where a written contract for the sale of real estate, states that the persons executing the same are acting as agents for the owner who afterwards in writing accepts the contract as his own, it becomes in legal effect an agreement between the purchaser and owner. *Findley v. Koch*, 131.

Estoppel. No act of an engineer appointed by the county to supervise the construction of bridges, nor of an individual member of the board of supervisors by which a contractor was permitted to erect less valuable structures than provided by the contract will estop the county from claiming damages for the default as against the contractor or any one claiming under him. *Modern Steel Structural Co. v. Van Buren County*, 606.

The representations of an agent as to title, who is authorized simply to sell, will not work an estoppel where there is no

AGENCY Continued

claim that he knew the purpose of the inquiry, or that his response was to be relied upon, or that the information was given in bad faith. *Iowa Railroad Land Co. v. Fehring*, 1.

Master and Servant: Employment of help: Authority of Agent.

Where the authority of the manager of a grain business to employ help is not expressly limited and there is a proven custom to employ solicitors for a year or longer, it will be presumed in the absence of a contrary showing that the authority was conferred in conformity with the custom; and an employé given a contract for a year will be protected when entered into in good faith and with reasonable prudence. *Roupke v. Grain Co.*, 632.

Insurance. One who upon his own request submits the application of a property owner for fire insurance to a foreign agency, is the agent of the company accepting the same and issuing a policy, under Code, section 1749. *Hartman & Daniels v. Hollowell*, 643.

Under the statutes regulating the transaction of insurance business, an agent effecting insurance on property in this State with a foreign company which is insolvent and unauthorized to do business in Iowa, is personally liable to the assured in case of loss, whether he actually knew of the insolvency of the company or not. *Idem.*

Where insurance agents with authority to issue policies, fraudulently and negligently issue one in direct violation of the company's instructions and purposely fail to report the risk, the company may recover of the agents in case of loss, the damage sustained by reason of such disobedience. *Continental Ins. Co. v. Clark & Cressler*, 274.

The fact that an insurance company did not have sufficient time after the issuance of a policy to avail itself of a provision for cancellation prior to a loss, was not a defense available to its agent in an action against him for the fraudulent issuance of the policy. *Idem.*

In an action against an insurance agent for wrongfully writing a risk at a lower rate than authorized and failing to report the same, and the evidence tended to show that the company would have cancelled the risk had it known of it, the measure of damages is the total loss sustained thereby. *Idem.*

Knowledge of agent accepting an application that the property is covered by other insurance, is binding on the company, and precludes a defense to an action on the policy based on that ground. *Johnson v. Ins. Co.*, 565.

AGENCY Continued

TO

ALIMONY

Where an agent has authority to contract insurance on behalf of the company indemnifying the insured against loss caused by lightning, and the agent agrees to issue such a policy, the insured is not responsible for the agent's omission to correctly report the risk. *McLaughlin v. Insurance Co.*, 149.

Where the agent issuing an insurance policy omitted by inadvertence to attach a clause indemnifying the insured against loss by lightning, according to agreement, he had authority to insert such a clause after loss occurred. *Idem.*

An agent's authority to issue a policy of insurance continues until he has executed the policy contracted for, and the fact that he is permitted to retain the same after it is ready for delivery, while incomplete, will not render the agent the representative of the insured so as to deprive him of the authority to complete the contract. *Idem.*

Mutual Insurance. Where an agent of a mutual insurance company, having authority to collect contingent fees, collected a fee in excess of the legal one on an agreement with assured that he would not be liable for any further premium during the first year of the policy, and the amount thereof turned over to the insurance company exceeded the amount which it would have received if the legal contingent fee had been charged, and thereafter an assessment was made not greater than the excess over the legal contingent fee in the hands of the company; it is held that the association could not defend a suit on the policy on the ground of nonpayment of the assessment, as it was estopped to deny the agent's authority to collect the excessive contingent fee, and had funds in its hands to satisfy the assessment. *Younghoe v. Insurance Co.*, 374.

ALIBI.

Reasonable doubt: Instructions. An instruction that defendant was not bound to establish an alibi beyond a reasonable doubt, and if the testimony raised a reasonable doubt that defendant was present at the commission of the crime he was entitled to an acquittal, was not objectionable as leading the jury to believe that it was only such doubt as to the alibi which would necessitate acquittal, where the doctrine of reasonable doubt was correctly stated in another instruction. *State v. Pray*, 249.

ALIMONY. See DIVORCE.

Support of Child. A husband is obligated to provide for his child given into the custody of his divorced wife, but no cause of action therefor arises until he has refused to respond to a

ALIMONY Continued

TO

APPEAL

just claim on him for the child's maintenance. Foote v. De Poy, 366.

ANIMALS.

Dogs: Killing of sheep: Evidence. Evidence that defendant, after learning of the loss of plaintiff's sheep and that his dog was charged with their destruction, killed the dog and remarked that "it would kill no more sheep," was admissible in an action for damages as an admission of liability. *Anderson v. Halverson*, 125.

Damages: Apportionment. Under Code, section 2340, where more than one dog was engaged in killing sheep, the owner of each is liable only for the damage done by his dog, and the amount of damage and an apportionment thereof is for the jury to determine. *Idem*.

Distrain. In an action for damages from trespassing cattle, an explanation of why the cattle were not distrained as soon as discovered, was properly admitted. *De Mers v. Rohan*, 488.

Trespassing animals: Liability of owner. Where there has been no legal partition of a division fence, and the stock of an adjoining owner break through onto the land of another and then into an enclosure surrounded by a lawful fence, the owner of the stock is liable for the damage done. *Idem*.

Warranty. A representation that an animal is as sure a foal getter as ordinary animals of like character, is a warranty of reasonable service as a foal getter. *Wingate v. Johnson*, 154.

The actual capacity of an animal for breeding purposes as demonstrated subsequent to a sale, may be shown in an action for the breach of a warranty that he was a sure foal getter. *Idem*.

APPEAL.

An appeal to the supreme court which is not presented in substantial conformity with the rules governing the same is not entitled to consideration. *Winkler v. Hawkes & Ackley*, 474.

Abstract. It does not necessarily follow from the fact that the cross-examination of certain witnesses does not appear in appellant's abstract, that the same does not contain the substance of the evidence as required to be set out; this objection should be met by an amended or additional abstract. *Wolf v. Elevator Co.*, 659.

Notice. The statement in an abstract that appellant gave notice of appeal to defendant and the clerk of the court from which the appeal was taken, and secured his fees, is sufficient to

APPEAL Continued

confer jurisdiction over a simple statement in denial that the appeal was perfected as required by law and that the notice of appeal was insufficient. *Dolan v. Blast Furnace Co.*, 254.

Service of notice of appeal need not be made on coparties whose interests cannot be prejudicially affected by the appeal. *Ewart v. Ewart*, 219.

Appeal by bankrupt. A defendant cannot complain that the plaintiff, having been adjudged a bankrupt after the trial, prosecutes the appeal in his own name, the trustee in bankruptcy having filed his written consent thereto. *Christy v. Stedman*, 428.

Appeal by cross defendant. An order for continuance against a defendant to a cross petition is not appealable. *Bussell v. City of Fort Dodge*, 308.

An appeal does not lie from an order refusing to direct a verdict in favor of a cross defendant, as to whom there had been no trial. *Idem*.

Argument. Where misconduct in argument is not so flagrant that it could not have been prevented or its resulting prejudice removed by an instruction, the cause will not be reversed on appeal on account thereof, no objection thereto having been raised in the trial court. *Gregory v. Railway Co.*, 230.

Change of venue. An application for change of venue is addressed to the discretion of the trial court, and its order will not be interfered with on appeal in the absence of a showing of abuse of such discretion. *State v. Icenbice*, 16.

Contempt: Review on certiorari. The statutes relating to procedure in contempt cases authorize the appellate court on *certiorari* to review the evidence and determine whether it is sufficient to make out a case of contempt. *Wells v. District Court*, 340.

Default. The order of the trial court in setting aside a default will not be disturbed on appeal unless a clear abuse of discretion is shown. *Carver v. Seevers & Bryan*, 669.

Eminent domain. Where a railway company appealed from an award of damages in a condemnation proceeding for right-of-way, an appeal by the landowner was not necessary in order that he might procure a larger award on the trial of a company's appeal. *McKinnon v. Railway Co.*, 426.

Where both the railway company and landowner appeal from an assessment of damages for right-of-way and the two appeals were consolidated after which the company dismissed its appeal without objection, the order of the district court in

APPEAL Continued

refusing to dismiss the landowner's appeal and affirm the assessment will not be reviewed. *Idem.*

Intoxicating liquors. The trial of an application for a liquor permit, to which objections are filed, is a special action or proceeding in which the remonstrants have such an interest as entitle them to appeal from an order granting the permit. *In re* Application of Smith, 128.

Objection to evidence. An objection to questions in an action for negligence, that they call for evidence of distinct prior acts of negligence, cannot be urged for the first time on appeal. *Gregory v. Railway Co.*, 230.

Plea in bar. One who has not pleaded a judgment in bar of the action cannot raise the question on appeal. *Newburn v. Lucas*, 85.

Pleadings. The insufficiency of a pleading which states a cause of action, cannot be first assailed in the appellate court. *Idem.*

An objection to the insufficiency of a pleading which was in no manner tested on the trial, is unavailable on appeal, where enough was alleged to present the issue upon which the case was tried, and no objection was made to the evidence in support thereof. *Fox v. National Bank*, 481.

The subsequent approval of the filing of a pleading is as effective as though permission had been granted in advance; and the court's discretion in permitting the dilatory filing of pleadings will not be disturbed on appeal in the absence of its abuse. *Rice v. Bolton*, 654.

Trial de novo. Although a case is triable *de novo* on appeal, in view of the opportunity of the trial judge to observe the demeanor of the witnesses, his findings will be disturbed with reluctance. *Johnson v. Insurance Co.*, 565.

Assessment of omitted property. Where an assessment of omitted property has been made and an appeal taken, it becomes the duty of the court to inquire into and determine *de novo* from all the evidence the liability for the assessment; and an unverified statement of omitted taxes prepared by agents of the county employed to discover the same, and the assessment thereof, does not make a *prima facie* case for the county requiring the taxpayer to show that specific items were erroneously listed. *Schoonover v. Petcina*, 261.

No formal pleadings are required in a proceeding to assess omitted property, and a taxpayer's general objection to an assessment, made before the treasurer, that the items of moneys and credits proposed to be assessed were not items for

APPEAL Continued

TO

ASSESSMENT OF SPECIAL TAXES

which he was liable for the years specified, and that his indebtedness for those years which he was entitled to set off against the same was equal to the amount of his moneys and credits, was sufficiently specific to raise the issue on appeal. *Idem.*

The issue on appeal from an assessment of omitted property is the correctness of the action of the taxing officer and the evidence must be confined to that issue, but the taxpayer is entitled to have every question determined anew which such officer was called upon to determine. *Idem.*

ARGUMENT.

Misconduct. Where misconduct in argument is not so flagrant that it could not have been prevented or its resulting prejudice removed by an instruction, the cause will not be reversed on appeal on account thereof, no objection thereto having been raised in the trial court. *Gregory v. Railway Co.*, 230.

ARREST OF JUDGMENT.

Where a petition in an action on the bond for damages for the wrongful issuance of a temporary injunction fails to state that the main action has been determined, a motion in arrest of judgment thereon, under Code, section 3758, will lie. *Lacey v. Davis*, 675.

ARSON.

Challenge to jurors. The appellate court will not presume prejudice from the ruling of the trial court in excusing a juror because wrongly named; nor will prejudice arise from a refusal to excuse another from the same panel for the same reason, where the objection was not made until after the exercise of a peremptory challenge. *State v. Pray*, 248.

ASSAULT. See **CRIMINAL LAW.**

Assault with intent to commit murder: Insanity: Burden of Proof. In a prosecution for assault with intent to commit murder, the defendant has the burden of proving the defense of insanity to the reasonable satisfaction of the jury by a preponderance of the evidence. *State v. Humbles*, 462.

ASSESSMENT INSURANCE. See **INSURANCE.****ASSESSMENT OF PROPERTY.** See **TAXATION.****ASSESSMENT OF SPECIAL TAXES.** See **TAXATION — SPECIAL ASSESSMENTS.**

ASSUMPTION OF RISK

TO

BANKRUPTCY

ASSUMPTION OF RISK. See NEGLIGENCE.

A telephone lineman not an inspector of wires, nor charged with the duty of inspecting or testing live wires, does not assume the risk of an injury resulting from a defective light wire. *Barto v. Telephone Co.*, 241.

ATTORNEYS.

Fines: Collection of attorney fees. An *ex parte* order in vacation for the issuance of an execution to collect, as attorney fees, ten per cent. of an uncollected fine imposed for the sale of liquor in violation of an injunction, is void for want of notice, and a suit to restrain its enforcement will lie. *McConkie v. Landt*, 317.

Where a fine has been imposed for the sale of liquor in violation of an injunction, the ten per cent. of the fine allowed by Code, section 2429, in addition to the reasonable fee provided for the attorney prosecuting the cause, cannot be recovered either as costs or otherwise until the fine has been collected. *Idem*.

ATTORNEY AND CLIENT.

Innocent purchaser. An attorney who has knowledge that the title to property has been procured from his client by fraud, is not a good faith purchaser in immediately procuring a conveyance to himself from his client's grantor. *Jordan v. Cathcart*, 600.

BANKRUPTCY.

Costs: Discharge in bankruptcy. A judgment for costs in a criminal case is not a debt "due for taxes" within the exception of the bankruptcy law of 1898 and is satisfied by the discharge of the judgment debtor in bankruptcy. *Olds v. Forrester*, 456.

A judgment for costs in a criminal case is not a debt based on fraud so as to prevent its release by discharge of the debtor in bankruptcy. *Idem*.

Fraudulent conveyances. Conveyances by a bankrupt can be avoided on the ground that they were given to hinder and delay creditors, only when made within four months prior to the filing of the petition in bankruptcy. *Murphy v. Murphy*, 57.

Limitation of actions. The amendment of 1903, by which the four months' clause of the bankruptcy act is made to count from the date of the recording of the instrument rather than its execution and delivery, is not retroactive, nor does it

BANKRUPTCY Continued

TO

BANKS AND BANKING

affect previous constructions of the statute, but limits the time within which proceedings may be instituted. *Idem.*

Mortgages: Avoidance: Rights of creditors. The provision of the bankruptcy act that "claims, which for want of record or other reasons would not have been valid liens against creditors of the bankrupt, shall not be liens against his estate," refers to the validity of liens under the State law; and a creditor existing when a mortgage is executed must have acquired a lien on the mortgaged property, by attachment or otherwise, prior to notice of the mortgage to entitle him to question its validity; but a subsequent creditor may attack it on the ground that he was fraudulently induced to extend credit. *Idem.*

Preference: Limitations. Under the bankruptcy law of 1898, it is the transfer of the property which is made an act of bankruptcy and not the recording of the instrument; and the four months within which a preference may be avoided by the trustee commences to run at the time the transfer was made. *Idem.*

Parties. A defendant cannot complain that the plaintiff, having been adjudged a bankrupt after the trial, prosecutes the appeal in his own name, the trustee in bankruptcy having filed his written consent thereto. *Christy v. Stedman*, 428.

BANKS AND BANKING.

Estoppel. Where the president of a national bank loaned bank money on real estate security in his own name, thereafter assigning the notes only to the bank, the mortgages securing the same were not taxable to such president as moneys and credits; nor was he estopped from claiming that the same were bank property because the transaction amounted to an evasion of the federal banking law. *Schoonover v. Petcina*, 261.

Taxation of bank securities. Where the owner of a private banking business sold and transferred the business and assets to a national bank of which he became a stockholder and its president, the notes and other evidences of indebtedness so transferred became the property of the national bank from the time of the transfer, and was no longer taxable to the assignor. *Idem.*

Insurance by mortgagee: False representations. A bank official having authority to loan its funds, may take as security a note and mortgage in his own name, and may insure the property as mortgagee in possession and collect the same in case of loss; and his statement in procuring insurance on the mort-

BANKS AND BANKING Continued TO

BOARD OF HEALTH

gaged property that he was a mortgagee, even though the funds loaned belonged to the bank, is not such a false representation of his interest in the property as to avoid the policy, especially where the agent at the time of issuing the policy was advised of the facts. *Dalton v. Insurance Co.*, 377.

BILLS AND NOTES.

Conditional delivery: Parol evidence. Where a note is delivered as security for a prior parol agreement, its conditional delivery may be shown by parol. *Oakland Cemetery Ass'n v. Lakins*, 121.

Discharge: Parol evidence. Where a note was executed in consideration of other prior agreements between the parties, parol evidence is admissible, in an action on the note, to show the entire agreement and that it had been performed. *Idem*.

Default in interest payments: Waiver. Acceptance and retention of past due interest on a note by the payees will preclude their assignees from enforcing a provision that upon the default in payment of interest the whole note shall become due, where the same was paid prior to notice of the assignment. *Hecker v. Boylan*, 162.

Execution of instruments: Burden of proof: Evidence. Where the execution of a note and mortgage is denied under oath, the burden is on a plaintiff seeking judgment and foreclosure, to prove the execution. Evidence is held insufficient to show that defendants signed the instruments in suit. *Damman v. Vollenweider*, 327.

Taxation of bank securities. Where the owner of a private banking business sold and transferred the business and assets to a national bank of which he became a stockholder and its president, the notes and other evidences of indebtedness so transferred became the property of the national bank from the time of the transfer, and was no longer taxable to the assignor. *Schoonover v. Pitcina*, 261.

Transfer: Defenses. Where a negotiable note is transferred by delivery and assignment, the holder becomes merely the assignee of a chose in action and takes the same subject to any defense in favor of the makers arising prior to notice of the transfer. *Hecker v. Boylan*, 162.

BOARD OF HEALTH.

Contagious disease: Employment of physician. A board of health of a special charter city may, in an emergency, legally contract with a member of the city council and also the

BOARD OF HEALTH Continued

TO

BRIDGES

health officer of the city to attend persons who are a county charge afflicted with a contagious disease. *Dewitt v. Mills County*, 169.

BOARD OF SUPERVISORS. See MUNICIPAL CORPORATIONS.

BONDS.

Liquor dealer's bond. A liquor dealer's bond providing for a compliance with the laws of the State is valid, although the statute in force at its execution was repealed or superseded by the Code of 1897; and would be good as a common law obligation even though not in conformity with the statute. *O'Brien County v. Mahon*, 539.

The sureties on a saloon keeper's bond are liable for the payment of the mulct tax. *Idem*.

The sureties on a liquor dealer's bond cannot escape liability for the mulct tax on the ground that by failure of the principal to pay the tax he is no longer operating under the law. *Idem*.

Mere failure to collect a mulct tax when due will not discharge the sureties on a liquor dealer's bond. *Idem*.

The sureties on a liquor dealer's bond are liable for the full tax for the quarter in which the obligation arose. *Idem*.

Failure of a liquor dealer's bond to describe the place where the business is to be conducted will not invalidate the bond. *Idem*.

A liquor dealer's bond given to secure immunity under the mulct law, which is accepted as sufficient and operated under, is supported by a sufficient consideration. *Idem*.

A county may recover from the sureties on a liquor dealer's bond without first exhausting the property of the principal. *Idem*.

Interest. Interest may be recovered in a suit on a liquor dealer's bond. *Idem*.

BREACH OF WARRANTY. See WARRANTIES.

BRIDGES.

Construction of bridges: Floods: Instructions. Where a railway company was authorized to construct its road over streams in such a manner as not to unnecessarily impede their flow and an issue of unnecessary obstruction was submitted, an instruction that defendant might, without liability, obstruct the stream so far as reasonably necessary to maintain its bridge in a safe condition, was as favorable as defendant was entitled to. *Vyse v. The Chicago, B. & Q. Ry. Co.*, 90.

BRIDGES Continued

Where an action for damage caused by flooding plaintiff's land was submitted on the theory that defendant's negligent construction of its bridge caused the overflow, and the court instructed that unless the same caused the water to flow over plaintiff's land he could not recover, failure to specifically cover the question of whether the flood which did the injury was surface water, was not error. *Idem.*

Fraud. Where a bridge contractor materially alters the plans and specifications for the construction of county bridges by reducing the amount of material therein, without the knowledge or consent of the county or its agents authorized to consent to the change, it amounts to a fraud for which the county may recover. *Modern Steel Structural Co. v. Van Buren County*, 606.

Breach of contract: Damages. Where a contractor, in the construction of county bridges, used material of less weight than provided in the contract, it was proper for the court in arriving at the measure of damages to add to the actual cost of the construction according to contract, the usual margin of profit to the contractor, as shown by the evidence. *Idem.*

Estoppel. The acceptance of a county bridge in ignorance of the fact that the same was not constructed in accordance with the contract, will not estop the county from insisting upon a breach of the contract or a recovery of damages. *Idem.*

The execution and delivery to a bridge contractor of a written acceptance of the work by individual members of the board of supervisors, made at an informal gathering for the purpose of examining the work to enable them to act intelligibly upon the matter of accepting the same, was not an act of the county; and it was not estopped thereby from relying on a breach of the contract in the construction of the bridge. *Idem.*

The public use of a bridge will not amount to an acceptance thereof and estop the county from insisting upon a breach of the contract for its construction. *Idem.*

Partial payments by a county auditor on a contract on the order of a single member of the board of supervisors and without knowledge of the contractor's default in construction, will not estop the county from asserting its claim for damages based on the contractor's breach of the contract. *Idem.*

A county cannot be estopped by the acts of its representative appointed to look after the construction of bridges, who, through collusion with the contractors, perpetrates a fraud on

BRIDGES Continued

TO

BURGLARY

the county by the substitution of materials inferior to that called for by the contract. *Idem.*

No act of an engineer appointed by the county to supervise the construction of bridges, nor of an individual member of the board of supervisors by which a contractor was permitted to erect less valuable structures than provided by the contract, will estop the county from claiming damages for the default as against the contractor or any one claiming under him. *Idem.*

Inspection and repair. Where a county, after notice of its unsafe condition, in undertaking to repair a bridge and put it in condition for public travel fails to use reasonable care in the work, it is negligent; and an inspection of the same after its repair by agents of the county who report it safe for ordinary travel, will not relieve the county from liability for the consequences of such negligence. *Schlensig v. Monona County*, 625.

BUILDING AND LOAN ASSOCIATIONS.

Contract of employment: Termination by legislative enactment.

A contract for personal services entered into with a building and loan association providing for compensation from a specified fund, which contemplates a possible change in the law rendering the creation of such a fund and payment of services therefrom illegal, is terminated by a subsequent legislative act to that effect, thus rendering performance impossible. *Wood & Duvall v. Association*, 464.

Mortgages: Foreclosure: Computation: Judgment. In construing Code, section 1898, relative to the foreclosure of a building and loan association mortgage, it is held that in computing the sum for which judgment should be entered, the borrower should be charged with the net amount of the loan received by him, together with twelve per cent. interest per annum thereon, and he should be credited with the full amount paid by him as dues, fees, fines, premiums, and interest, and judgment should be rendered for the difference, if any; but if the payments exceed the net amount of the loan and interest then the association is not entitled to judgment. *Weaver, J., dissenting. Iowa Deposit & Loan Co. v. Matthews*, 743.

BURGLARY. See CRIMINAL LAW.

Evidence. In a prosecution for burglary, evidence examined and held to sustain a verdict of guilty. *State v. McPherson*, 77.

A conviction of burglary will not be reversed because of the

BURGLARY Continued

TO

CERTIFICATES

admission of incompetent evidence, where objection thereto was waived by silence or otherwise. *State v. Conroy*, 472.

Conversations in defendant's hearing. In a prosecution for burglary claimed to have been planned by defendant, evidence of a conversation between two others relative to a deposit of the money stolen, was admissible, there being evidence that defendant was within hearing distance. *State v. Richards*, 497.

Flight. In a prosecution for burglary, an instruction that flight is a circumstance which *prima facie* indicates guilt, is not objectionable as charging that it was presumptive evidence of guilt. *Idem*.

Impanelling grand jury: Place of holding court. The adjournment of court duly convened in the court room to another room in the court house which was adequate for the purpose of impanelling the grand jury, and to permit a defendant charged with crime who was in a weak physical condition to be present, was not a violation of Code, sections 283 and 286, providing that judicial proceedings must be public and held at the place provided by law. *Idem*.

Objection to grand jury: Waiver. A defendant held to answer before the return of an indictment who fails to appear and challenge the grand jury, although at an adjourned term, waives any objection to the selection and drawing of the jury. *State v. McPherson*, 77.

Possession of stolen property. A defendant charged with burglary should be permitted to explain his declarations concerning his possession of the stolen property, made shortly after he acquired possession and before his accusation. *State v. Conroy*, 472.

CERTIFICATES.

Certification of records. The certificate of a clerk of courts of a foreign State which refers to and is attached to a copy of the record certified, will be presumed to have been lawfully made and to certify to the copy of the record to which it is attached, although made on a separate sheet. *Woodworth v. McKee*, 714.

Jurisdiction: Presumption. Where the certificate to a judgment record of another State shows that the judgment was rendered by a court of record with a clerk and seal, it will be presumed that the court had jurisdiction of the parties and the subject matter, until the contrary is shown. *Idem*.

CERTIORARI

TO

CHANGE OF VENUE

CERTIORARI.

Contempt: Review on certiorari. The statutes relating to procedure in contempt cases authorize the appellate court on *certiorari* to review the evidence and determine whether it is sufficient to make out a case of contempt. *Wells v. District Court*, 340.

Contempt: Trial: Evidence. In a contempt proceeding for attempting to influence a juror, the admission of a transcript of evidence taken upon the trial of another cause, based largely upon the same state of facts, which included a transcript of testimony before a committee of the bar association, was error, the defendant being entitled to a trial under the statute; and, not having been a party to the other case nor the committee investigation, such matters were hearsay and inadmissible. *Hunter v. District Court*, 357.

Taxation of costs. Where the trial court is without jurisdiction or acts illegally in the taxation of costs, its rulings may be reviewed on *certiorari*. *Berkey v. Thompson, Judge*, 394.

CHALLENGE OF JURORS.

The appellate court will not presume prejudice from the ruling of the trial court in excusing a juror because wrongly named; nor will prejudice arise from a refusal to excuse another from the same panel for the same reason, where the objection was not made until after the exercise of a peremptory challenge. *State v. Pray*, 248.

Peremptory challenges. Swearing of the jury in a criminal case before the defendant had exhausted his peremptory challenges, was not reversible error, where he made no objection nor excepted thereto. *State v. Icenbice*, 16.

Waiver of objection to juror. An objection to a juror because of his relation to the prosecuting witness in a criminal action, which becomes known to defendant's counsel during the trial, is waived by failure to call attention to the fact prior to the verdict. *State v. Pray*, 248.

CHALLENGES. See JURORS — CHALLENGE OF JURORS.

CHANGE OF VENUE.

An application for change of venue is addressed to the discretion of the trial court, and its order will not be interfered with on appeal in the absence of a showing of abuse of such discretion. *State v. Icenbice*, 16.

The affidavits in support of a resistance to a motion for a change

CHANGE OF VENUE Continued

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of venue in a criminal case, on the ground of excitement or prejudice in the county, are not required to negative any relationship between affiants and the complaining witness. *Idem*.

From justice's court: Waiver of error. It is error for a justice to grant a change of venue after the determination of a motion to strike from the answer and to make it more specific, as the same constitutes a commencement of the trial within the meaning of Code, section 4502; and the error is not waived by proceeding to trial. *Columbus Junction Tel. Co. v. Overholt*, 579.

CHATTEL MORTGAGES.

Description of property. A description in a chattel mortgage as "one bay horse twelve years old named Mike, one bay mare, white strip in forehead, named Mollie, twelve years old," the mortgage also stating from whom purchased, the residence of the mortgagors and that the property was in their possession there to remain until default in payment or an attempted sale, was sufficiently definite to authorize its admission in evidence. *Colean Implement Co. v. Strong*, 598.

Identification of property. Where the description in a mortgage is sufficiently definite to justify its admission in evidence, the property may then be identified by extrinsic evidence. *Idem*.

Inconsistent provisions: Right to foreclose. The written portions of an instrument will control the printed provisions where the same are inconsistent, so that where it appeared from the terms of a note and chattel mortgage covering a stock of goods, that the mortgagor reserved the right to handle the same in the regular mercantile way and that the indebtedness should be paid from the sales of the stock, a printed provision that the mortgagee might take possession whenever he chose, was inoperative. *Sylvester v. Ammons*, 140.

CHOSSES IN ACTION.

Bills and notes: Transfer: Defenses. Where a negotiable note is transferred by delivery and assignment, the holder becomes merely the assignee of a chose in action and takes the same subject to any defense in favor of the makers arising prior to notice of the transfer. *Hecker v. Boylan*, 162.

CITIES UNDER SPECIAL CHARTER. See MUNICIPAL CORPORATIONS.

CODIFICATION.

Statutory construction. A general recodification and re-enactment of the statute law does not indicate a legislative intent

CODIFICATION Continued

TO

COMPROMISE AND SETTLEMENT

to change the same, and the decisions relating to statutory provisions then in force will continue controlling in the interpretation of the same provisions; but where it is the plain legislative intent to radically change or materially add to the previous statutes, such decisions are not controlling. *Martin v. Oskaloosa*, 680.

COLLATERAL ATTACK.

Appointment of guardian ad litem. An order of court appointing a guardian *ad litem* and directing the sale of a minor's property after service of notice but prior to the date specified therein, though irregular, is not subject to collateral attack where no application for its correction was made during the term and the record was subsequently approved. *Rice v. Bolton*, 654.

COMMISSIONS. See AGENCY.

COMPENSATION OF PUBLIC OFFICERS.

Mulct tax: Collection. That portion of the regular annual mulct tax which a county is required by law to pay to a city, is not subject to the county treasurer's charge of three fourths of one per cent. for collection, as provided in Code, section 490, but any additional tax imposed by the city for its benefit and collected by the treasurer should pay this commission. *City of Waverly v. Bremer County*, 98.

Court reporter. The shorthand reporter of a superior court is entitled to compensation for all of the time he is required to attend court, in the same manner as reporters of the district courts, and his compensation is not restricted to the time he is actually engaged in taking evidence. *Ferguson v. Pottawattamie County*, 108.

COMPLAINT. See RAPE — CRIMINAL LAW.

Complaint of prosecutrix. In rape, failure of the prosecutrix to make complaint affects only her credibility, and circumstances of excuse may be shown to negative any inference to be drawn from such failure. *State v. Icenbice*, 16.

COMPROMISE AND SETTLEMENT.

Exclusion of evidence. In an action to recover of an attorney money collected for a client after deducting a stated collection fee, where defendant admitted the service but denied that the collection fee as alleged was agreed upon, and pleaded other and prior services performed and full settlement of the entire controversy, it was error to exclude evidence of such other serv-

COMPROMISE AND SETTLEMENT Cont'd TO

CONSTITUTIONAL LAW

ice, and the error was not cured by the indirect appearance in the record of a portion of the excluded testimony. *Greenlee v. Mosnat*, 330.

CONCURRENT INSURANCE. See **INSURANCE.****CONDEMNATION.**

Appeal. Where both the railway company and landowner appeal from an assessment of damages for right-of-way and the two appeals were consolidated after which the company dismissed its appeal without objection, the order of the district court in refusing to dismiss the landowner's appeal and affirm the assessment will not be reviewed. *McKinnon v. Railway Co.*, 426.

Where a railway company appealed from an award of damages in a condemnation proceeding for right-of-way, an appeal by the landowner was not necessary in order that he might procure a larger award on the trial of the company's appeal. *Idem.*

CONFESSIONS.

Where a confession appears to have been voluntarily made, the burden is on defendant to show such coercion or inducement as to require its exclusion. *State v. Icenbice*, 16.

Identity of defendant. In a prosecution for rape, the confessions of defendant constitute sufficient evidence to take the case to the jury on the question of his identity. *Idem.*

Proof of same. Oral testimony of a confession is not competent, where the confession was reduced to writing and signed, but its admission was not reversible error where the writing afterward admitted, substantiated the oral statements. *State v. Usher*, 287.

CONSPIRACY. See **CRIMINAL LAW.**

Evidence: Letters. In proof of conspiracy, it is error to permit the addressee to testify to the contents of a letter claimed to have been written by defendant, on proof simply of the address and signature, there being no other evidence connecting defendant with the letter. *State v. Conroy*, 472.

CONSTITUTIONAL LAW.

Classification: Uniformity: Due process of law. The act of the legislature limiting the time within which actions should be commenced to enforce all judgments rendered between the taking effect of the Code of 1873 and the Code of 1897, is not unconstitutional for nonuniformity, as it applies to all such

CONSTITUTIONAL LAW Continued

TO

CONTAGIOUS DISEASE

judgments as a class, and the act simply reorganizes a classification made by prior legislation; nor is it void as depriving the judgment holder of rights without due process of law. *Wooster v. Bateman*, 552.

Contempt: Statutes. The provisions of the statute prescribing the procedure for the punishment of constructive contempts are not unconstitutional as depriving courts of their inherent power to punish contempt, but rather provide regulations for the exercise thereof; nor do they deprive the accused of any constitutional right or punish him without due process of law. *Drady v. District Court*, 345.

Statute of limitations: Amendment. The legislature may amend an existing statute so as to lengthen or shorten the time within which a cause of action on a judgment will be barred, without violating the constitutional prohibition against the impairment of contracts, if a reasonable time is given for the commencement of action before the bar becomes effectual. *Wooster v. Bateman*, 552.

Trial by jury: Waiver of right. The right of a trial by jury is a constitutional guaranty which cannot be waived by a defendant in a criminal case, and a judgment entered on a trial to the court will be reversed on appeal. *State v. Rea*, 65.

CONTAGIOUS DISEASE.

Compensation of physician: Liability of county. Under section 2570, Code of 1897, the liability of a county became absolute for the bill of a physician employed by a local board of health to attend a person afflicted with contagious disease, as the same was allowed by the board of health, where it appeared that the patient and those liable for his support were unable to pay. *Resner v. Carroll County*, 423.

A board of supervisors had no authority under code of 1897 to reduce the bill of a physician for attending a smallpox patient, where the same had been audited and allowed by the board of health, and the acceptance of a portion of the sum did not bar a claim for the balance, in the absence of agreement. *Idem*.

Employment of physician. A board of health of a special charter city may, in an emergency, legally contract with a member of the city council and also the health officer of the city to attend persons who are a county charge afflicted with a contagious disease. *Dewitt v. Mills County*, 169.

CONTEMPT

CONTEMPT.

Constitutional law: Statutes. The provisions of the statute prescribing the procedure for the punishment of constructive contempts are not unconstitutional as depriving courts of their inherent power to punish contempt, but rather provide regulations for the exercise thereof; nor do they deprive the accused of any constitutional right or punish him without due process of law. *Drady v. District Court*, 345.

The statutes defining contempts and prescribing the procedure for their punishment, cover the whole of the subject-matter, and therefore operate to repeal the common law on the subject. *Idem.*

Certiorari. In a contempt proceeding for attempting to influence a juror, the admission of a transcript of evidence taken upon the trial of another cause, based largely upon the same state of facts, which included a transcript of testimony before a committee of the bar association, was error, the defendant being entitled to a trial under the statute; and, not having been a party to the other case nor the committee investigation, such matters were hearsay and inadmissible. *Hunter v. District Court*, 357.

The statutes relating to procedure in contempt cases authorize the appellate court on *certiorari* to review the evidence and determine whether it is sufficient to make out a case of contempt. *Wells v. District Court*, 340.

Evidence. Contempt proceedings are criminal in nature, and to authorize a conviction the proof of guilt should be clear and satisfactory. The evidence is reviewed and held insufficient to make out a case. *Idem.*

In a proceeding to punish for contempt an attempt to influence the verdict of a juror, the evidence is reviewed and held sufficient to support a judgment of guilty. *Drady v. District Court*, 345.

Where there was competent evidence to support a conviction for contempt, the admission of a transcript of accused's testimony before an investigating committee of the bar, was not prejudicial error. *Idem.*

Influencing juror. The court has power under Code, section 4461, to punish for contempt an attempt to influence a juror of the general panel, made prior to the time he was sworn to try the particular case. *Marvin v. District Court*, 355.

Intoxicating liquors: Injunction. A decree enjoining defendant

CONTEMPT Continued

TO

CONTRACTS

from illegally selling liquors in a certain building was not void, depriving the court of jurisdiction to punish for contempt, because reciting that defendant was not the owner of the premises during the time of such sales and that since that time the same had been sold and possession given. *Ohlrogg v. District Court*, 247.

Jurisdiction. A contempt proceeding may be tried by any judge of the court in which the offense was committed. *Drady v. District Court*, 345.

Procedure. Under the Code, a denial by the accused of the contempt charged does not operate, as at common law, to purge him of the offense, but the court is to determine by a trial the facts put in issue by the answer; and a contrary view is not indicated by the provisions of Code, section 2407, relating to the violation of a liquor nuisance injunction. *Idem*.

An application to punish for contempt may properly be made in a pending case, rather than by an independent proceeding in the name of the State; and the court will take notice of the records of prior proceedings in the case without their introduction in evidence. *Ferguson v. Wheeler*, 111.

Punishment. The district court of Pottawattamie county sitting at Council Bluffs has jurisdiction to enter an order of punishment for contempt in a case pending in the same court at Avoca, in said county, where the parties stipulate that the contempt proceedings shall be heard at that time and place. *Idem*.

CONTINUANCE.

Appeal by cross defendant. An order for continuance against a defendant to a cross petition is not appealable. *Bussell v. City of Fort Dodge*, 308.

Continuance to take depositions. Under Code, section 3652, a party may elect to take his evidence by deposition, and he is entitled to a reasonable time in which to do so; and after issue joined, there being no order to take the evidence during the term, nor a showing of sufficient time had such order been entered, he is entitled to a continuance. *Husted v. Williams*, 634.

CONTRACTS.

Approval of void contract. An order of court approving a void contract is of no effect, where its validity was not adjudicated. *Foote v. De Poy*, 366.

Brokerage agency: Transfer. The contract of a real-estate agent to transfer to another a list of properties which he has

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for sale on commission that such other may arrange terms of sale with the owners, is not a transfer of the agency and therefore not objectionable on that ground. *Roush v. Gesman Bros. & Grant*, 493.

Breach of contract: Acceptance: Estoppel. The acceptance of a county bridge in ignorance of the fact that the same was not constructed in accordance with the contract, will not estop the county from insisting upon a breach of the contract or a recovery of damages. *Modern Steel Structural Co. v. Van Buren County*, 606.

The execution and delivery to a bridge contractor of a written acceptance of the work by individual members of the board of supervisors, made at an informal gathering for the purpose of examining the work to enable them to act intelligibly upon the matter of accepting the same, was not an act of the county; and it was not estopped thereby from relying on a breach of the contract in the construction of the bridge. *Idem*.

The public use of a bridge will not amount to an acceptance thereof and estop the county from insisting upon a breach of the contract for its construction. *Idem*.

Partial payments by a county auditor on a contract on the order of a single member of the board of supervisors and without knowledge of the contractor's default in construction, will not estop the county from asserting its claim for damages based on the contractor's breach of the contract. *Idem*.

Where a manufacturer failed to furnish a contractor with brick for the construction of walks as agreed, the contractor was entitled to recover as his damage the difference between the contract price and what he was compelled to pay elsewhere, on such walks as he had built or was directed by the city to build under his contract, but not upon such walks as he might have procured orders to construct. *Iowa Brick Mfg. Co. v. Herick*, 721.

Contract of employment. A contract of employment for personal services to be performed in the future, is not the subject for an action for specific performance, but the remedy in case of breach is a law action for damages. *Wood & Duvall v. Association*, 464.

A contract for personal services entered into with a building and loan association providing for compensation from a specified fund, which contemplates a possible change in the law rendering the creation of such a fund and payment of services therefrom illegal, is terminated by a subsequent legislative act

CONTRACTS Continued

to that effect, thus rendering performance impossible. *Idem.*
Contracts in restraint of trade. An agreement to refrain from doing a real estate and insurance business in a limited territory and for a valid consideration is enforceable. *Roush v. Gesman Bros. & Grant*, 493.

Completion of contract by agent. An agent's authority to issue a policy of insurance continues until he has executed the policy contracted for, and the fact that he is permitted to retain the same after it is ready for delivery, while incomplete, will not render the agent the representative of the insured so as to deprive him of the authority to complete the contract. *McLaughlin v. Insurance Co.*, 149.

Compliance with contract. The fact that an animal is valuable will not obviate the objection that it is not in compliance with the contract of sale. *Redhead Bros. v. Cattle Co.*, 410.

Under a contract to sell thoroughbred bulls suitable for service, it is competent to show that the tender of a calf of five months was not a compliance. *Idem.*

Contracts with county. Any contract entered into by a board of supervisors to furnish the county supplies, materials, or labor, which is with or for the benefit of any member of the board, is void to the extent of such member's interest therein. Evidence held to show the contract in suit void as to the interest of a supervisor herein. *Nelson v. Harrison County*, 436.

The invalidity of a contract made by a county and the issuance of a warrant thereunder, cannot be determined in a suit between the county and its treasurer to restrain the payment of the warrant, to which the person with whom the contract was made and warrant issued was not a party. *Idem.*

A contract for improvement of a highway made through an arrangement with and for the benefit of a member of the board of supervisors, is fraudulent and void. *Idem.*

A contract prohibited by statute is void, and where county warrants in whole or in part are issued to members of a board of supervisors on either an express or implied contract to furnish the county materials or labor, the same should be cancelled or reduced by the court to the lawful amount, though in the hands of a third party. *Idem.*

Election of remedies. Where the vendor of personal property, after tender and refusal, brought action to recover the contract price, he was not barred on the ground of election of remedies from thereafter amending and asking a recovery of damages for breach of the contract. *Redhead Bros. v. Cattle Co.*, 410.

CONTRACTS Continued

Executory contract for sale of land. As between the parties to an executory contract for the sale of land, where the vendor retains the possession, rents and profits until the conveyance is due, he is liable for the payment of accruing taxes in the absence of an agreement by which the purchaser assumes that obligation: and this rule is not affected by Code, section 1400. *Clinton v. Shugart*, 179.

The provisions of an executory contract for the sale of land are considered, and it is held that there is nothing to indicate an understanding of the parties that the purchaser should pay the taxes falling due prior to a conveyance of the title. *Idem*.

Insurance: Contract by agent. Where an agent has authority to contract insurance on behalf of the company indemnifying the insured against loss caused by lightning, and the agent agrees to issue such a policy, the insured is not responsible for the agent's omission to correctly report the risk. *McLaughlin v. Insurance Co.*, 149.

Reformation of policy. Where a provision in a policy for concurrent insurance has been omitted by oversight, equity will reform the contract to correspond with the understanding of the parties. *Dalton v. Insurance Co.*, 377.

Forfeiture of policy. The conditions of an insurance policy which if violated render the same void, will be strictly construed and in cases of doubt will be resolved against the company, so that a contract of sale of the property which will work a forfeiture under the provisions thereof must be one which is enforceable and not a mere option or dependent upon some contingency to give it vitality. In the instant case the contract is held unenforceable. *Swank v. Insurance Co.*, 544.

Limitation of action. An action against a city on an implied contract to pay the cost of sewerage must be brought within five years from the date at which the cause of action accrued, in the absence of such facts as operate to toll the statute. *Citizens' Bank of Des Moines v. City of Spencer*, 101.

Municipal improvement contracts. The provisions of a paving contract requiring the contractor to pay all damage arising from the work; to leave all permanent streets, walks and alleys in as good condition as when found; to indemnify the city against claims arising from injury to person or property on account of the work; to pay all injury to water, gas and sewer pipes; and to keep the pavement in repair for one year, do not invalidate the contract. *Diver v. Savings Bank*, 691.

The provisions of a paving contract limiting the contractor's

CONTRACTS Continued

right in the employment of help and purchase of material are invalid, but a property owner who made no objection to the same until after the work was done and the benefit accrued cannot complain thereof, where it affirmatively appears that the cost of the work was not thereby increased. *Idem*.

After a municipal improvement has been made and accepted by the city, a taxpayer, in the absence of actual fraud, cannot resist payment therefor because of a violation of Code, section 943, prohibiting a member of the council from being interested in any contract for such work. *Idem*.

Partnership contract: Consideration. An oral agreement by which defendant was to purchase in his own name a single tract of land, paying therefor with his own funds, to be repaid by a sale of mining rights, and to which plaintiffs neither contributed nor engaged to contribute anything, if sufficient to establish a partnership in the profits, still the agreement could not be enforced for want of consideration. *Forrest v. O'Bryan*, 571.

Rescission of contracts. Where defendants were not ready, able, and willing to perform their contract for the conveyance of land at the time specified, and plaintiff tendered a draft for the amount of a cash payment to which no objection was made, and nothing was said regarding a mortgage to be given for deferred payments, such tender was sufficient to support plaintiff's suit to rescind. *Primm v. Wise & Stern*, 528.

Where time is of the essence of a contract to convey land, plaintiff, to establish his right to rescind for defendant's default, must prove that he was ready, able, and willing to perform his part and made substantial tender of performance on the date specified. *Idem*.

Where plaintiff, under a contract to purchase real estate, knew that defendants had no title on the date specified for performance and that they were unable to perform, it was not necessary for him before rescinding to make a technical tender of performance, provided he was ready, able, and willing to perform had defendants been able to do so. *Idem*.

Where defendants, having only an option to purchase land, agreed to convey it at a specified time under a contract of which time was the essence, and they were unable to procure title on that date, such breach of the contract entitled their purchaser to rescind. *Idem*.

A contract providing that vendors shall have a reasonable time after tender of an abstract to remedy defects in the title, does

CONTRACTS Continued

not contemplate a complete absence of title and delay for the purpose of procuring the same. *Idem*.

Recovery of purchase money. A recovery of earnest money by a purchaser of land who has lost his rights under the contract, cannot be had in a suit for specific performance by way of damages. *Findley v. Koch*, 131.

Severability. A contract to furnish brick for paving purposes, payments to be made monthly for those furnished during the month, is severable, and failure to pay an installment will not release the seller from the contract. *Iowa Brick Mfg. Co. v. Herrick*, 721.

Specific performance. In an action for specific performance of a contract to convey land, the evidence is reviewed upon which it is held that by plaintiff's neglect to carry out the contract they had forfeited the right to specific performance and damages. *Findley v. Koch*, 131.

Unreasonable delay in insisting on performance, and negligence in carrying out the contract, will defeat specific performance, although time is not specifically made the essence of the contract. *Idem*.

Where a written contract for the sale of real estate, states that the persons executing the same are acting as agents for the owner who afterwards in writing accepts the contract as his own, it becomes in legal effect an agreement between the purchaser and owner. *Idem*.

The courts of this State have jurisdiction to decree specific performance of a contract for the sale of land situated in another State, where the parties to the action are residents of Iowa. *Rea v. Ferguson*, 704.

Subcontractor's claims. Where a county has not reserved the right to pay the claim against a contractor employed to construct bridges, and a subcontractor has failed to file the statement of his demand as provided by Code, section 3102, the county may rightfully pay the contractor according to the terms of the contract, without inquiring as to materials furnished by subcontractors. *Modern Steel Structural Co. v. Van Buren County*, 606.

A subcontractor who furnishes material for the construction of county bridges under an agreement with the principal contractor alone, is charged with notice of the terms and conditions of the principal contract, and his rights are limited thereby; and where the county has lawfully discharged its obligation to the contractor prior to notice of the subcon-

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tractor's claim, or where the contract is void for fraud, the subcontractor has no recourse against the county. *Idem.*

Where a county contracted separately for the construction of two bridges and was sued by a subcontractor who furnished material for both under a single agreement with the contractor, and who made but a single statement for the materials furnished and was seeking to enforce its entire claim against the county for an alleged unpaid balance for either or both bridges, the county could offset its entire damages for a breach of both contracts in determining whether there was anything in its hands applicable to the subcontractor's demand. *Idem.*

Taxation of contracts: What constitutes a credit. Where one purchases land, paying therefor and taking title in his own name, and in accordance with a previous understanding enters upon a contract of lease for a rental based upon an interest rate on his investment, giving to the lessee an option to purchase the same within a specified time upon payment of its cost to the lessor, the transaction does not amount to a contract giving rise to any actual indebtedness which is assessable as a credit. *Schoonover v. Petcina*, 261.

CONVEYANCES.

Growing crops. Unmatured crops receiving nourishment from the soil pass with a conveyance. *Newburn v. Lucas*, 85.

Transfer of land: Fraud: Damages. The sale by a corporation of its capital stock, its sole assets consisting of a tract of land, operated as a transfer of the land and entitled the vendee to an action for damages for false representations as to the quantity, the same as though the transfer had been by deed. *Boddy v. Henry*, 31.

Vendor's lien. A grantor claiming that his conveyance was voluntary and without any agreement with the grantee, cannot have a vendor's lien for the price. *Ostenson v. Severson*, 197.

CORPORATE STOCK.

Liens: Notice. A corporation may create a lien on the stock of any holder thereof, to secure the amount of his liability to the corporation, by a provision to that effect in its articles of incorporation; and the lien so created will be valid as against third persons, though without actual notice thereof. *Dempster Manufacturing Co. v. Downs*, 80.

CORPORATIONS.

Embezzlement: Criminal intent: Evidence. To charge an officer

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of a corporation with embezzlement of funds by the corporation on the theory that the course of business adopted by such officer inevitably led to that result, the criminal intent of such officer in the management of the corporate business must be shown, and evidence of the method of discounting notes and the use of accommodation paper, transactions in themselves not unlawful, is inadmissible on the question of criminal intent. *State v. Carmean*, 291.

On the prosecution of an official for the misappropriation of a particular fund received by the corporation, of which he had no knowledge, evidence of other like transactions not tending to establish a criminal intent with respect to the specific wrong charged, is inadmissible. *Idem*.

Where an officer is charged with embezzlement effected through the corporation's course of business, the book entries of clerks made without defendant's knowledge, are not admissible to show a misappropriation. *Idem*.

Liens: Notice. A corporation may create a lien on the stock of any holder thereof, to secure the amount of his liability to the corporation, by a provision to that effect in its articles of incorporation; and the lien so created will be valid as against third persons, though without actual notice thereof. *Dempster Manufacturing Co. v. Downs*, 80.

Misapplication of funds: Criminal liability of officer. An officer of a corporation transacting a lawful business is not guilty of larceny under Code, section 4842, for the act of his subordinates in making a misapplication of funds paid to the corporation by a customer, where the same is not done with his knowledge or under his direction, and from which he receives no personal benefit. *State v. Carmean*, 291.

Indictment. To hold an officer of a corporation liable for the fraudulent misappropriation of funds of a customer, entrusted to the corporation, it must be charged in the indictment and shown that the general business of the corporation was illegal, or that the misappropriation in the particular case was with the knowledge or direction of such officer with criminal intent. *Idem*.

Transfer of land: Fraud: Damages. The sale by a corporation of its capital stock, its sole assets consisting of a tract of land, operated as a transfer of the land and entitled the vendee to an action for damages for false representations as to the quantity, the same as though the transfer had been by deed. *Boddy v. Henry*, 31.

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CORROBORATION.

Confession: Instructions. Where the commission of rape by someone was fully shown, the fact that evidence of confessions of defendant was introduced to supply the corroboration required to connect defendant with the crime, did not require an instruction that he could not be convicted on his confession not made in open court. *State v. Icenbice*, 16.

COSTS.

Criminal Costs. The costs in a criminal prosecution are not part of the fine imposed as a punishment for the offense, and a release of the costs by discharge in bankruptcy is not contrary to public policy because interfering with the administration of the criminal law. *Olds v. Forrester*, 456.

Defective record. Although an abstract is not so defective that a motion to affirm or strike should be sustained, still where the questions and answers are needlessly set out the cost of printing may be taxed to appellant on reversal. *Plagge v. Mensing*, 737.

Discharge in Bankruptcy. A judgment for costs in a criminal case is not a debt "due for taxes" within the exception of the bankruptcy law of 1898 and is satisfied by the discharge of the judgment debtor in bankruptcy. *Olds v. Forrester*, 456.

A judgment for costs in a criminal case is not a debt based on fraud so as to prevent its release by discharge of the debtor in bankruptcy. *Idem*.

Taxation of costs. The expense of preparing a translation of the shorthand reporter's notes for use on appeal should ordinarily be taxed by the appellate court; and so long as the case is pending on appeal the district court has no jurisdiction to tax any costs which may be taxed in the supreme court. *Berkey v. Thompson*, Judge, 394.

Where the trial court is without jurisdiction or acts illegally in the taxation of costs, its rulings may be reviewed on *certiorari*. *Idem*.

The district court has no jurisdiction to tax the costs of printing an appeal, or the fees of the clerk of the supreme court. *Idem*.

The right to recover costs is to be determined by the judgment, and during the pendency of an appeal the district court has no jurisdiction to modify or correct the same, and generally has no authority in an equity action to pass upon a motion to re-tax after an appeal has been taken. *Idem*.

Where the appellant in his reply brief failed to discuss any

Costs Continued

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matters not sufficiently presented in appellee's opening argument, to enable a full response in appellant's main argument, the costs of the reply will be taxed to him. *Schoonover v. Petcina*, 261.

Where the merits of a controversy are found against a plaintiff, the defendant is entitled to full costs, though during the trial he disclaimed any interest in a portion of the property in controversy. *Daly v. Simonson*, 716.

COUNTERCLAIM.

An independent cause of action cannot be pleaded in a replevin action either as a counterclaim or otherwise as a defense. *Sylvester v. Ammons*, 140.

COUNTIES. See **MUNICIPAL CORPORATIONS.**

Mulct tax. A county may recover from the sureties on a liquor dealer's bond without first exhausting the property of the principal. *O'Brien County v. Mahon*, 539.

The county may recover the entire mulct tax, though one-half is to go to the municipality. *Idem*.

COURTS.

Default judgments: Setting aside. An inferior court has jurisdiction to set aside a default judgment, notwithstanding a transcript has been filed in the district court. *Klepfer v. City of Keokuk*, 592.

Impanelling grand jury: Place of holding court. The adjournment of court duly convened in the court room to another room in the court house which was adequate for the purpose of impanelling the grand jury, to permit a defendant charged with crime who was in a weak physical condition to be present, was not a violation of Code, sections 283 and 286, providing that judicial proceedings must be public and held at the place provided by law. *State v. Richards*, 497.

CREDITS.

Taxation. The deferred payments due on a mutually obligatory contract for the sale of land are taxable as a credit under Code, section 1308. *Cross v. Snakenberg*, 636.

CRIMINAL INTENT.

Instruction. On a prosecution for embezzlement, it was error to charge that criminal intent may be inferred from the inevitable result of the act done, or from the opportunity to ascertain the wrongful act, and the error was not cured by another

instruction that to convict there must be proof of the felonious intent to convert the fund. *State v. Carmean*, 291.

CRIMINAL LAW.

Burglary: Objection to grand jury: Waiver. A defendant held to answer before the return of an indictment who fails to appear and challenge the grand jury, although at an adjourned term, waives any objection to the selection and drawing of the jury. *State v. McPherson*, 77.

Change of venue. The affidavits in support of a resistance to a motion for a change of venue in a criminal case, on the ground of excitement or prejudice in the county, are not required to negative any relationship between affiants and the complaining witness. *State v. Icenbice*, 16.

An application for change of venue is addressed to the discretion of the trial court, and its order will not be interfered with on appeal in the absence of a showing of abuse of such discretion. *Idem*.

Costs. The costs in a criminal prosecution are not part of the fine imposed as a punishment for the offense, and a release of the costs by discharge in bankruptcy is not contrary to public policy because interfering with the administration of the criminal law. *Olds v. Forrester*, 456.

Identity of defendant. In a prosecution for rape, the confessions of defendant constitute sufficient evidence to take the case to the jury on the question of his identity. *State v. Icenbice*, 16.

Impaneling grand jury: Place of holding court. The adjournment of court duly convened in the court room to another room in the court house which was adequate for the purpose of impaneling the grand jury, to permit a defendant charged with crime who was in a weak physical condition to be present, was not a violation of Code, sections 283 and 286, providing that judicial proceedings must be public and held at the place provided by law. *State v. Richards*, 497.

Information. An information before a mayor charging the violation of an ordinance prohibiting an open drinking resort on Sunday, may be amended so as to describe the place, even after an appeal to the district court. *Town of Lovilia v. Cobb*, 557.

It is not necessary that an information be marked "filed" by a magistrate, where it was sworn to before him and left with him and treated as an information in the trial of a case. *Idem*.

Larceny. An officer of a corporation transacting a lawful busi-

CRIMINAL LAW Continued

ness is not guilty of larceny under Code, section 4842, for the act of his subordinates in making a misapplication of funds paid to the corporation by a customer, where the same is not done with his knowledge or under his direction, and from which he receives no personal benefit. *State v. Carmean*, 291.

Peremptory Challenges. Swearing of the jury in a criminal case before the defendant had exhausted his peremptory challenges, was not reversible error, where he made no objection nor excepted thereto. *State v. Icenbice*, 16.

Reasonable doubt: Review on appeal. The appellate court will not pass on the question of reasonable doubt in reviewing the evidence, but if the verdict has support and the jury has been properly instructed, its finding on the question is final. *State v. Pray*, 248.

Sequestration of Witnesses: Discretion of court. It was not an unreasonable exercise of discretion to permit the wife of a prosecuting witness to testify, after remaining in the court room during the examination of the other witnesses for the State, in violation of a sequestration order, it appearing that the sheriff did not enforce the order for the reason that she was the only lady witness. *Idem*.

Trial by jury: Waiver of right. The right of a trial by jury is a constitutional guaranty which cannot be waived by a defendant in a criminal case, and a judgment entered on a trial to the court will be reversed on appeal. *State v. Rea*, 65.

A defendant may waive a jury on the trial of an appeal from a conviction before a mayor for the violation of an ordinance. *Town of Lovilia v. Cobb*, 557.

EVIDENCE.

Assault with intent to commit murder: Insanity: Burden of proof. In a prosecution for assault with intent to commit murder, the defendant has the burden of proving the defense of insanity to the reasonable satisfaction of the jury, by a preponderance of the evidence. *State v. Humbles*, 462.

Burglary. In a prosecution for burglary, evidence examined and held to sustain a verdict of guilty. *State v. McPherson*, 77.

A conviction of burglary will not be reversed because of the admission of incompetent evidence, where objection thereto was waived by silence or otherwise. *State v. Conroy*, 472.

Complaint of prosecutrix. In rape, failure of the prosecutrix to make complaint affects only her credibility, and circumstances of excuse may be shown to negative any inference to be drawn from such failure. *State v. Icenbice*, 16.

CRIMINAL LAW Continued

Contempt. Contempt proceedings are criminal in nature, and to authorize a conviction the proof of guilt should be clear and satisfactory. The evidence is reviewed and held insufficient to make out a case. *Wells v. District Court*, 340.

Confessions. Where a confession appears to have been voluntarily made, the burden is on defendant to show such coercion or inducement as to require its exclusion. *State v. Icenbice*, 16.

Oral testimony of a confession is not competent, where the confession was reduced to writing and signed, but its admission, was not reversible error where the writing afterward admitted, substantiated the oral statements. *State v. Usher*, 287.

Conversations in defendant's hearing. In a prosecution for burglary claimed to have been planned by defendant, evidence of a conversation between two others relative to a deposit of the money stolen, was admissible, there being evidence that defendant was within hearing distance. *State v. Richards*, 497.

Cross-examination. The testimony on cross-examination of a witness for the State which is foreign to his testimony in chief should be excluded. *State v. Usher*, 287.

Cross-examination: Prejudicial error. Where a physician testified that defendant employed him shortly after the burglary and paid him for his service requesting that he "keep still," it was not prejudicial error to refuse the cross-examination of the physician as to his qualification to practice medicine. *State v. Richards*, 497.

Cross-examination of defendant. The State may cross-examine a defendant as to his residence or occupation, although it may tend to discredit him. *State v. Wasson*, 320.

Embezzlement. To charge an officer of a corporation with embezzlement of funds by the corporation on the theory that the course of business adopted by such officer inevitably led to that result, the criminal intent of such officer in the management of the corporate business must be shown, and evidence of the method of discounting notes and the use of accommodation paper, transactions in themselves not unlawful, is inadmissible on the question of criminal intent. *State v. Carmean*, 291.

On the prosecution of an official for the misappropriation of a particular fund received by the corporation, of which he had no knowledge, evidence of other like transactions not tending to establish a criminal intent with respect to the specific wrong charged, is inadmissible. *Idem*.

Where an officer is charged with embezzlement effected through the corporation's course of business, the book entries of clerks

CRIMINAL LAW Continued

made without defendant's knowledge, are not admissible to show a misappropriation. *Idem*.

In a prosecution for embezzlement under Code, section 4842, it is essential to find the value of the property embezzled, the same as in larceny, to determine the punishment. *Idem*.

General moral character. Where a witness has testified in chief to his knowledge of the general moral character of defendant and that it was good, he may be cross-examined on that question as to his knowledge of any matters tending to discredit his estimate of defendant's character. In the instant case, moreover, the answers on cross-examination are held to have been without prejudice. *State v. Richards*, 497.

Hypothetical questions. On a prosecution for murder effected by strychnine poisoning, the admission of an answer to a hypothetical question, although based in part upon facts not clearly proven, was not prejudicial where the witness subsequently gave the same answer to a question from which the objectionable matter was eliminated. *State v. Robinson*, 69.

In a prosecution for murder by strychnine poisoning, it was not prejudicial error to permit a hypothetical question to a chemist, containing a symptom which defendant claimed had not been proven, where the real purport of the question was whether the chemical analysis of the contents of the stomach would reveal strychnine provided death was due to such poisoning. *Idem*.

Impeachment. It is error to permit the State to impeach a defendant on immaterial matters developed on his cross-examination. *State v. Wasson*, 320.

Identity of defendant. In a prosecution for rape, the confessions of defendant constitute sufficient evidence to take the case to the jury on the question of his identity. *State v. Icenbice*, 16.

Insanity. The jury is not required to accept as a verity the statements of experts based on hypothetical questions, as to the insanity of a defendant, but may weigh it as other testimony and from all of the evidence on the subject determine the fact. *State v. Humbles*, 462.

Letters. In proof of conspiracy, it is error to permit the addressee to testify to the contents of a letter claimed to have been written by defendant, on proof simply of the address and signature, there being no other evidence connecting defendant with the letter. *State v. Conroy*, 472.

Murder in first degree. On a prosecution for murder based on the felonious administration of strychnine to an infant, the evi-

CRIMINAL LAW Continued

dence is reviewed and held sufficient to sustain a conviction of murder. *State v. Robinson*, 69.

Possession of stolen property. A defendant charged with burglary should be permitted to explain his declarations concerning his possession of the stolen property, made shortly after he acquired possession and before his accusation. *State v. Conroy*, 472.

Seduction: Reputation of prosecutrix. On a prosecution for seduction, evidence of the general moral character of the prosecutrix, when she is a witness for the State, is admissible for the purpose of testing her credibility, but should ordinarily be confined to the time of trial. *State v. Haupt*, 152.

Telegrams. A telegram sent by defendant to his associate in the crime, which was shown to have been agreed upon beforehand and which corresponded with the agreement, was admissible; especially as there was evidence tending to show that defendant sent it. *State v. Richards*, 497.

INDICTMENT.

Misappropriation of funds. To hold an officer of a corporation liable for the fraudulent misappropriation of funds of a customer, entrusted to the corporation, it must be charged in the indictment and shown that the general business of the corporation was illegal, or that the misappropriation in the particular case was with the knowledge or direction of such officer with criminal intent. *State v. Carmean*, 291.

Poisoning. An indictment for murder effected by means of a felonious administration of poison, need not allege a specific intent to kill. *State v. Robinson*, 69.

Robbery: Ownership of property. An indictment for robbery which does not allege the ownership of the property, is insufficient. *State v. Wasson*, 320.

Sufficiency. While in general it is sufficient to charge an offense in the language of the statute, this rule does not obtain where the statute does not necessarily charge the offense named. *Idem*.

INSTRUCTIONS.

Confession. Where the commission of rape by someone was fully shown, the fact that evidence of confessions of defendant was introduced to supply the corroboration required to connect defendant with the crime, did not require an instruction that he could not be convicted on his confession not made in open court. *State v. Icenbice*, 16.

Criminal intent. On a prosecution for embezzlement, it was

CRIMINAL LAW . Continued

error to charge that criminal intent may be inferred from the inevitable result of the act done, or from the opportunity to ascertain the wrongful act, and the error was not cured by another instruction that to convict there must be proof of the felonious intent to convert the fund. *State v. Carmean*, 291.

Flight. In a prosecution for burglary, an instruction that flight is a circumstance which *prima facie* indicates guilt, is not objectionable as charging that it was presumptive evidence of guilt. *State v. Richards*, 497.

Reasonable doubt. An instruction that defendant was not bound to establish an alibi beyond a reasonable doubt, and if the testimony raised a reasonable doubt that defendant was present at the commission of the crime he was entitled to an acquittal, was not objectionable as leading the jury to believe that it was only such doubt as to the alibi which would necessitate acquittal, where the doctrine of reasonable doubt was correctly stated in another instruction. *State v. Pray*, 248.

Self-defense. In a prosecution for murder which is admitted but justified on the ground of self-defense, the defendant is entitled to an instruction that the burden is on the State to show that the act was not in self-defense, especially where the tenor of instructions given were calculated to impress the jury with the idea that it was a defense for the defendant to establish. *State v. Usher*, 287.

Venue. Where the venue is clearly proven and the necessity of proving the same is stated in an instruction relating to an included offense, the failure to so instruct in connection with the higher offense charged, is not error. *State v. Icenbice*, 16.

PRACTICE.

Admission of evidence. A conviction of burglary will not be reversed because of the admission of incompetent evidence, where objection thereto was waived by silence or otherwise. *State v. Conroy*, 472.

The testimony on cross-examination of a witness for the State which is foreign to his testimony in chief should be excluded. *State v. Usher*, 287.

In proof of conspiracy, it is error to permit the addressee to testify to the contents of a letter claimed to have been written by defendant, on proof simply of the address and signature, there being no other evidence connecting defendant with the letter. *State v. Conroy*, 472.

CROSS DEFENDANT

TO

DAMAGES

CROSS DEFENDANT.

An appeal does not lie from an order refusing to direct a verdict in favor of a cross defendant, as to whom there had been no trial. *Bussell v. City of Fort Dodge*, 308.

CROSS EXAMINATION. See **CRIMINAL LAW — EVIDENCE.**

CUSTOM.

Employment of help: Authority of agent. Where the authority of the manager of a grain business to employ help is not expressly limited and there is a proven custom to employ solicitors for a year or longer, it will be presumed in the absence of a contrary showing that the authority was conferred in conformity with the custom; and an employé given a contract for a year will be protected when entered into in good faith and with reasonable prudence. *Roupke v. Grain Co.*, 632.

Evidence. The testimony of a witness on the question of a custom, that he had read of the same, was not prejudicial where the existence of the custom was not disputed. *Idem*.

DAMAGES.

Apportionment. Under Code, section 2340, where more than one dog was engaged in killing sheep, the owner of each is liable only for the damage done by his dog, and the amount of damage and an apportionment thereof is for the jury to determine. *Anderson v. Halverson*, 125.

Breach of contract. Where a contractor, in the construction of county bridges, used material of less weight than provided in the contract, it was proper for the court in arriving at the measure of damages to add to the actual cost of the construction according to contract, the usual margin of profit to the contractor, as shown by the evidence. *Modern Steel Structural Co. v. Van Buren County*, 606.

Where a manufacturer failed to furnish a contractor with brick for the construction of walks as agreed, the contractor was entitled to recover as his damage the difference between the contract price and what he was compelled to pay elsewhere, on such walks as he had built or was directed by the city to build under his contract, but not upon such walks as he might have procured orders to construct. *Iowa Brick Mfg. Co. v. Herrick*, 721.

Deeds: Breach of covenants. In an action for breach of covenants of warranty without reservation, a statement of the grantee's agent in procuring the deed which was made to

DAMAGES Continued

the grantor, that it was the custom of the grantor to retain the crops where the conveyance was not made until after July 1st, upon which the vendor did not rely, and it further appearing that there was no agreement between the vendor and vendee that the crops should be reserved; held that the grantee was entitled to damages for failure to secure the crops, although the agent's statement may have been within the scope of his authority. *Newburn v. Lucas*, 85.

Drainage: Insufficiency of evidence. The owner of lower land cannot restrain the owner above him from tiling his open ditches, on the theory simply that the location of the tile below the surface would drain a greater area more rapidly and carry additional water onto plaintiff's land which otherwise would evaporate or be absorbed, in the absence of evidence showing that the tiling increased the flow and caused actual damage. Evidence reviewed and fails to show an increased injury. *Plagge v. Mensing*, 737.

Contract of employment. A contract of employment for personal services to be performed in the future, is not the subject for an action for specific performance, but the remedy in case of breach is a law action for damages. *Wood & Duvall v. Association*, 464.

Election of remedies. In an action for the price of brick sold for sidewalk purposes, notice to the manufacturer in effect that the contractor would purchase brick elsewhere and charge the difference in cost to the manufacturer, he having failed to furnish the same according to contract, was not an election of remedies constituting a waiver of the contractor's right to recover damages upon the contract other than the difference in the cost of the brick. *Iowa Brick Mfg. Co. v. Herrick*, 721.

Evidence. Where the plaintiff sought to show that his meadow had been permanently injured by fire which consumed the grass, it was competent for defendant to prove that land some distance away which had been burned over at about the same time was uninjured, although not shown to have been similarly situated. *Castner v. Railway Co.*, 581.

It was not error for the court, in computing damages sustained by a county by reason of the failure of a contractor to use the amount of material contracted for in the construction of bridges, to follow the figures given by an expert witness who was corroborated as to the amount of shortage, rather than the estimate of an officer of the company which furnished the material based upon the factory weights of which he had no personal knowledge, and who testified simply to the approxi-

DAMAGES Continued

mate correctness of his estimate. *Modern Steel Structural Co. v. Van Buren County*, 606.

Where it appeared that the agents of an insurance company recommended the payment of a loss in full, the amount of the adjustment was competent evidence of the company's loss in an action against the agents for the wrongful issuance of the policy. *Continental Ins. Co. v. Clark & Cressler*, 274.

Failure to pay taxes. Where it clearly appears from the deed itself that it was the intent of the parties to except taxes from the covenants of warranty, the grantee is not entitled to damages for the grantor's failure to pay the same. *Newburn v. Lucas*, 85.

Fraudulent conveyances: Recovery of consideration. Where a conveyance of an undivided one-third interest in land has been set aside as fraudulent, the plaintiff is entitled to recover one-third of the value of the whole tract. *Eighmy v. Brock*, 535.

Growing Crops. In an action for breach of covenants of warranty in a deed for the loss of growing crops, the measure of damages is the value of the crops at the time of the conveyance. *Newburn v. Lucas*, 85.

Insurance: Liability of agent. In an action against an insurance agent for wrongfully writing a risk at a lower rate than authorized and failing to report the same and the evidence tended to show that the company would have cancelled the risk had it known of it, the measure of damages is the total loss sustained thereby. *Continental Insurance Co. v. Clark & Cressler*, 274.

Market value. Where the vendor of cattle for breeding purposes, after tender and refusal, elects to retain the same and claims as damages the difference between the contract price and the market value at the time and place of delivery named in the contract, the value of the cattle for beef was not the proper measure of damages, although their delivery was fixed at a time when there was little sale for breeding purposes, but the jury should have been permitted to consider the fact that the season would soon reopen and to look to sales of similar property within a reasonable time of the delivery together with the cost of keeping the animals, in determining their market value. *Redhead Bros. v. Cattle Co.*, 410.

Quantum meruit. One dealing with a municipal corporation is bound to take notice of the statutory limitations upon its power, and the unauthorized act of a city council in contracting

DAMAGES Continued

for sewerage will not estop the city from denying liability therefor, notwithstanding the implied representations of authority so to do; nor is a *quantum meruit* recovery in such cases authorized. *Citizens' Bank of Des Moines v. City of Spencer*, 101.

Recovery of purchase money. A recovery of earnest money by a purchaser of land who has lost his rights under the contract, cannot be had in a suit for specific performance by way of damages. *Findley v. Koch*, 131.

Specific performance. A purchaser of land who is not entitled to specific performance of the contract because of his lack of diligence in asserting his rights thereunder, is not entitled to damages for the vendor's refusal to convey, after the lapse of a reasonable time. *Idem*.

The purchaser of a minor's interest in real property under a contract with the guardian, having knowledge of the minority and the necessity of an order of court to make the conveyance, cannot, on the dismissal by the court of an application for such order, recover substantial damage for loss of profits in an action for specific performance. *Eggert v. Pratt*, 727.

Street obstructions. Where a railroad embankment obstructs a street affording access to business property which has not been vacated, the owner is entitled to damages for depreciation in the value of his property caused thereby. *Harrington v. Railway Co.*, 388.

Tender: Instructions. Where plaintiff, under a contract to sell defendant a certain number of registered cattle tendered a lot that were unregistered and therefore refused, and subsequently tendered another lot which were registered but not accepted whereupon plaintiff brought his action for damages and his testimony as to damage was confined to the registered animals, an instruction permitting the jury to base its finding upon the first tender of which there was no evidence as to damage, was error. *Redhead Bros. v. Cattle Co.*, 410.

Transfer of land: Fraud. The sale by a corporation of its capital stock, its sole assets consisting of a tract of land, operated as a transfer of the land and entitled the vendee to an action for damages for false representations as to the quantity, the same as though the transfer had been by deed. *Boddy v. Henry*, 31.

Vacation of Streets: Where a street has been vacated by the city for railway purposes, one whose property has been in-

DAMAGES Continued

TO

DEEDS

jured by the construction of the road cannot recover damages of the railway company. *Harrington v. Railway Co.* 388.

DEBT.

What constitutes a debt. An obligation which a taxpayer may deduct from the amount of his moneys and credits under Code, section 1311, must be an actual indebtedness, and notes signed simply as an endorser which were so reported to the comptroller of currency by such indorser, do not constitute such indebtedness. *Schoonover v. Pitcina*, 261.

Judgment for costs. A judgment for costs in a criminal case is not a debt based on fraud so as to prevent its release by discharge of the debtor in bankruptcy. *Olds v. Forrester*, 456.

Judgment for costs: Discharge in bankruptcy. A judgment for costs in a criminal case is not a debt "due for taxes" within the exception of the bankruptcy law of 1898 and is satisfied by the discharge of the judgment debtor in bankruptcy. *Idem*.

Homesteads: Previously contracted debts. A debt for which a homestead may be sold on execution under Code, section 2976, is one which has become a fixed obligation, subject to enforcement prior to the acquisition of the homestead. The evidence in this case fails to show an antecedent debt such as is contemplated by the statute. *Anderson v. Kyle*, 666.

DECEIT.

Instructions: Intent to deceive. In an action for false representations, an intent to deceive will be presumed from proof of the falsity of the statements and defendant's knowledge thereof; and repeated instructions placing upon plaintiff the additional burden of showing that the representations were made with intent to deceive, and omitting from the entire charge any statement that fraudulent intent would be inferred from proof of the known falsity of representations, was error. *Boddy v. Henry*, 31.

DEEDS.

Breach of covenants: Damages. In an action for breach of covenants of warranty without reservation, a statement of the grantee's agent in procuring the deed which was made to the grantor, that it was the custom of the grantor to retain the crops where the conveyance was not made until after July 1st, upon which the vendor did not rely, and it further appearing that there was no agreement between the vendor and vendee that the crops should be reserved; held that the

DEEDS Continued

TO

DEFAULTS

grantee was entitled to damages for failure to secure the crops, although the agent's statement may have been within the scope of his authority. *Newburn v. Lucas*, 85.

An action on the covenants of a deed cannot be defeated by parol evidence of the grantee's knowledge of an incumbrance. *Idem*.

Breach of warranty: Lien for damages. Where plaintiff and his grantor exchanged lands, and there was a breach of warranty as to the crops under the covenants in the grantor's deed, plaintiff was entitled to a lien for his damages on the land conveyed to the grantor. *Idem*.

Failure to pay taxes. Where it clearly appears from the deed itself that it was the intent of the parties to except taxes from the covenants of warranty, the grantee is not entitled to damages for the grantor's failure to pay the same. *Idem*.

Mental incapacity. In an action to set aside a deed on the ground of mental incapacity, the evidence is reviewed and held insufficient to establish incapacity, fraud, or undue influence. *Brown v. Cole*, 711.

Growing crops. Unmatured crops receiving nourishment from the soil pass with a conveyance. *Newburn v. Lucas*, 85.

Recitals. The recital in a deed that it is "subject to all incumbrances of record" means subject to valid incumbrances, and the same will not estop the owner from questioning an invalid municipal assessment. *Carter v. Cemansky*, 506.

Trusts: Parol evidence. A deed absolute on its face and reciting a consideration cannot, in the absence of fraud, be shown by parol to be in trust for the grantor. *Ostenson v. Severson*, 197.

A deed reciting a consideration cannot be shown by parol to be a trust. *Byerly v. Sherman*, 447.

DEFAULTS.

The order of the trial court in setting aside a default will not be disturbed on appeal unless a clear abuse of discretion is shown. *Carver v. Seevers & Bryan*, 669.

Affidavit of merits. In an action for a personal injury, an affidavit of merits in support of a motion to set aside a default, which alleges a belief that the accident was the result of plaintiff's negligence and not that of defendant, is sufficient without setting out all the facts upon which the conclusion rests. *Klepfer v. City of Keokuk*, 592.

DEFAULTS Continued

TO

DISTRAINT

Failure to plead to an amendment. Where the parties proceed to trial without answer or other pleading to an amended petition, the plaintiff cannot afterwards claim that defendant is in default or that the allegations in the amendment should be treated as confessed. *Gregory v. Bowlsby*, 588.

Setting aside defaults. Setting aside a default to permit a defense on the merits is a matter largely within the discretion of the trial court, and its order will not be disturbed except in cases of abuse. *Klepfer v. City of Keokuk*, 592.

An inferior court has jurisdiction to set aside a default judgment, notwithstanding a transcript has been filed in the district court. *Idem*.

Where time to file a substituted petition is given "until" a certain day, the day named will be excluded unless a contrary intention appears, and a default judgment taken upon a petition filed on the day so named will be set aside without the filing of an affidavit of merits and an answer. *Carver v. Seever & Bryan*, 669.

DEMAND.

Demand that official sue. A citizen and taxpayer cannot maintain a suit to recover funds of a city alleged to have been misappropriated, without first demanding of the proper officers that suit be brought, or a showing that such demand would have been unavailing. *Reed v. Cunningham*, 302.

DEPOSITIONS.

Continuance to take depositions. Under Code, section 3652, a party may elect to take his evidence by deposition, and he is entitled to a reasonable time in which to do so; and after issue joined, there being no order to take the evidence during the term, nor a showing of sufficient time had such order been entered, he is entitled to a continuance. *Husted v. Williams*, 634.

Written exceptions. An objection to a deposition because of the insufficiency of the notice should be overruled where no exceptions were filed as required by Code, section 4712. *Ostenson v. Severson*, 197.

DESCRIPTION OF PROPERTY. See CHATTEL MORTGAGE.

DISTRAINT.

Evidence. In an action for damages from trespassing cattle, an explanation of why the cattle were not distrained as soon as discovered, was properly admitted. *De Mers v. Rohan*, 488.

DISTRIBUTIVE SHARE

TO

DRAINAGE

DISTRIBUTIVE SHARE.

Estates of decedents: Sale of undivided interest. The unassigned distributive share of an heir in the undivided interest of his intestate in real property may be levied upon. *Byerly v. Sherman*, 447.

DIVISION FENCES. See **FENCES.**

DIVORCE.

Duress: Avoidance of contract. Where a divorced husband aged and enfeebled in body and mind and under temporary guardianship, is induced under circumstances indicating an unfair advantage and coercion to enter into a contract turning over a large part of his estate to a trustee for the benefit of a child, the custody of whom was awarded his divorced wife, and for whom suitable provision was made in the divorce proceedings, his heirs at law, upon his death, may have the contract cancelled. *Foote v. De Poy*, 366.

Support of child. A husband is obligated to provide for his child given into the custody of his divorced wife, but no cause of action therefor arises until he has refused to respond to a just claim on him for the child's maintenance. *Idem*.

DOGS.

Killing of sheep: Evidence. Evidence that defendant, after learning of the loss of plaintiff's sheep and that his dog was charged with their destruction, killed the dog and remarked that "it would kill no more sheep," was admissible in an action for damages as an admission of liability. *Anderson v. Halverson*, 125.

DOWER.

Devise in lieu of dower: Election: Estoppel. Under the Code of 1873, the one-third interest of a widow in the real estate of her husband was not affected by his will giving her a life estate in lieu of dower, unless she consented thereto by an election entered of record within six months after notice to her by interested parties of the provisions of the will; nor would the management of the entire estate and receipt of rents and profits during her natural life work an estoppel. *Byerly v. Sherman*, 447.

DRAINAGE.

Damage: Insufficiency of evidence. The owner of lower land cannot restrain the owner above him from tiling his open
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DRAINAGE Continued

TO

DRUGGISTS' PERMITS

ditches, on the theory simply that the location of the tile below the surface would drain a greater area more rapidly and carry additional water onto plaintiff's land which otherwise would evaporate or be absorbed, in the absence of evidence showing that the tiling increased the flow and caused actual damage. Evidence reviewed and fails to show an increased injury. *Plagge v. Mensing*, 737.

Easement: Adverse user. The act of one landowner in filling a highway ditch carrying water from the land of an adjacent owner onto his own, when done within the period of limitation, will defeat the claim of easement growing out of adverse user. *Schofield v. Cooper*, 334.

Estoppel. No matter what the evidence may show in support of an estoppel, if not pleaded it is unavailing. In the instant case the evidence fails to show that one landowner was estopped as against another from filling a drainage ditch. *Idem*.

Nuisance: Abatement. Where the county constructed a highway ditch in such manner that the surface water from the land of one landowner was made to flow unnaturally over the land of another, the latter had the right to abate the nuisance so created by going upon the highway and filling the ditch. *Idem*.

Surface water: Diversion. A county in the improvement of highways has no right to collect surface water either from the highway or from adjoining lands and turn it onto the land of another where it had not naturally flown. *Idem*.

DRUGGISTS' PERMITS.

Pleadings: Evidence. An applicant for a permit to sell liquor must allege and prove that he has been lawfully conducting a pharmacy for the six months preceding, and where it appears that he has recently surrendered a permit after an action for its revocation had been instituted, he should probably be required to allege and prove that he has not knowingly made unlawful sales for two years prior to his application. Evidence held insufficient to authorize the granting of a permit. *In re Application of Smith*, 128.

Trial of application for permit: Appeal. The trial of an application for a liquor permit, to which objections are filed, is a special action or proceeding in which the remonstrants have such an interest as entitle them to appeal from an order granting the permit. *Idem*.

DURESS

TO

ELECTION OF REMEDIES

DURESS.

Avoidance of contract. Where a divorced husband aged and enfeebled in body and mind and under temporary guardianship, is induced under circumstances indicating an unfair advantage and coercion to enter into a contract turning over a large part of his estate to a trustee for the benefit of a child, the custody of whom was awarded his divorced wife, and for whom suitable provision was made in the divorce proceedings, his heirs at law, upon his death, may have the contract cancelled. *Foot v. De Poy*, 366.

EASEMENT.

Adverse user. The act of one landowner in filling a highway ditch carrying water from the land of an adjacent owner onto his own, when done within the period of limitation, will defeat the claim of easement growing out of adverse user. *Schofield v. Cooper*, 334.

ELECTION.

Devise in lieu of dower: Estoppel. Under the Code of 1873, the one-third interest of a widow in the real estate of her husband was not affected by his will giving her a life estate in lieu of dower, unless she consented thereto by an election entered of record within six months after notice to her by interested parties of the provisions of the will; nor would the management of the entire estate and receipt of rents and profits during her natural life work an estoppel. *Byerly v. Sherman*, 447.

ELECTION OF REMEDIES.

In an action for the price of brick sold for sidewalk purposes, notice to the manufacturer in effect that the contractor would purchase brick elsewhere and charge the difference in cost to the manufacturer, he having failed to furnish the same according to contract, was not an election of remedies constituting a waiver of the contractor's right to recover damages upon the contract other than the difference in the cost of the brick. *Iowa Brick Mfg. Co. v. Herrick*, 721.

A plaintiff may plead as many causes of action of the same general character as he may possess in separate counts, and is not required to elect under which he will proceed. *Watters v. Waterloo*, 199.

Breach of contract. Where the vendor of personal property, after tender and refusal, brought action to recover the con-

ELECTION OF REMEDIES Continued TO

EMBEZZLEMENT

tract price, he was not barred on the ground of election of remedies from thereafter amending and asking a recovery of damages for breach of the contract. *Redhead Bros. v. Cattle Co.*, 410.

Specific performance. In a suit by the purchaser for specific performance of a contract to convey land, the defendant is not entitled to a decree authorizing him to elect whether he will return the amount paid on the purchase price or accept the balance due and deliver the deed, where time was not the essence of the contract or where he had taken no steps to declare a forfeiture, and especially when such relief was not asked by pleading or otherwise. *Rea v. Ferguson*, 704.

ELECTRICITY.

Negligence: Incompetency of fellow servant: Liability of master. An employer in dealing with highly charged electric wires is held to great care in protecting his servants from injury therefrom, and is not excused from responsibility for the death of a servant caused by the negligence of an inexperienced fellow servant, to whom he had intrusted the work of repairing a defective live wire, by the mere fact that he did not know of such servant's incompetency. *Scott v. Telephone Co.*, 524.

EMBEZZLEMENT.

Criminal intent. On a prosecution for embezzlement, it was error to charge that criminal intent may be inferred from the inevitable result of the act done, or from the opportunity to ascertain the wrongful act, and the error was not cured by another instruction that to convict there must be proof of the felonious intent to convert the fund. *State v. Carmean*, 291.

To charge an officer of a corporation with embezzlement of funds by the corporation on the theory that the course of business adopted by such officer inevitably led to that result, the criminal intent of such officer in the management of the corporate business must be shown, and evidence of the method of discounting notes and the use of accommodation paper, transactions in themselves not unlawful, is inadmissible on the question of criminal intent. *Idem.*

Evidence. On the prosecution of an official for the misappropriation of a particular fund received by the corporation, of which he had no knowledge, evidence of other like transactions not tending to establish a criminal intent with respect to the specific wrong charged, is inadmissible. *Idem.*

EMBEZZLEMENT

TO

EQUITY

Where an officer is charged with embezzlement effected through the corporation's course of business, the book entries of clerks made without defendant's knowledge, are not admissible to show a misappropriation. *Idem.*

Indictment. To hold an officer of a corporation liable for the fraudulent misappropriation of funds of a customer, entrusted to the corporation, it must be charged in the indictment and shown that the general business of the corporation was illegal, or that the misappropriation in the particular case was with the knowledge or direction of such officer with criminal intent. *Idem.*

Value of property. In a prosecution for embezzlement under Code, section 4842, it is essential to find the value of the property embezzled, the same as in larceny, to determine the punishment. *Idem.*

EMINENT DOMAIN.

Appeal. Where both the railway company and landowner appeal from an assessment of damages for right-of-way and the two appeals were consolidated after which the company dismissed its appeal without objection, the order of the district court in refusing to dismiss the landowner's appeal and affirm the assessment will not be reviewed.* *McKinnon v. Railway Co.*, 426.

Where a railway company appealed from an award of damages in a condemnation proceeding for right-of-way, an appeal by the landowner was not necessary in order that he might procure a larger award on the trial of the company's appeal. *Idem.*

EQUITY.

Actions: Equitable relief. Where a suit in equity by a vendee of real property for specific performance and one at law to rescind the contract are pending at the same time, the court may proceed to determine the material issues in the equity suit regardless of which action was begun first. *Clinton v. Shugart*, 179.

Administrators: Discharge: Infant claimants. The mere fact of infancy will not authorize a court of equity to set aside an order discharging an administrator, to permit the filing of a claim against the estate which is barred by the statute. *Boyle v. Boyle*, 167.

Fraudulent conveyances: Burden of proof: Evidence. A step-

EQUITY Continued

father who obtains from his step-daughter barely eighteen years of age and while a member of his family, a conveyance to her interest in real property for an inadequate consideration, has the burden of negating the presumption of fraud and undue influence. The conveyance in question was obtained under circumstances entitling plaintiff to equitable relief. *Eighmy v. Brock*, 535.

Redemption from mortgage foreclosure: Accounting. A mortgagor whose property has been sold on foreclosure or his assignee may maintain an equitable action to redeem if brought prior to the expiration of the statutory period of redemption, and where possession has been taken by the holder of the certificate of sale without assent he may have an accounting of the rents and profits and of any portion of the property converted by the certificate holder to his own use, for the purpose of ascertaining the amount required to make redemption. *Dolan v. Blast Furnace Co.*, 254.

Reformation of instruments. A mortgagee in possession of personal property has an insurable interest, and where it was the understanding that a policy should be written to cover such interest, but the agent failed to write it in conformity with the agreement, equity will reform and enforce the contract as mutually intended. Evidence reviewed and held sufficient to authorize reformation. *Dalton v. Insurance Co.*, 377.

Where a provision in a policy for concurrent insurance has been omitted by oversight, equity will reform the contract to correspond with the understanding of the parties. *Idem*.

Where a lessor, in preparing a lease, takes advantage of his tenant's ignorance and confidence in him, and omits a provision authorizing the tenant to remove improvements placed on the premises by him, equity will reform the instrument. *Daly v. Simonson*, 716.

Specific performance: When denied: Evidence. Equity requires of a purchaser of land the utmost good faith on his part in attempting to carry out the contract, before specific performance will be decreed at his suit, and if his delay renders performance inequitable or unjust to the seller it will be denied. Evidence held to show such delay and inaction on the part of the purchaser as to justify a refusal of specific performance. *Findley v. Koch*, 131.

ESTATES OF DECEDENTS

ESTATES OF DECEDENTS.

Estoppel. Where heirs knowingly accept the proceeds of an unauthorized sale of devised land, for full value, they are thereafter estopped from asserting an interest in the land, in the absence of a showing that the money was received under either a misapprehension of their rights or an offer to return the same. *Knutson v. Vidders*, 511.

Insurance: Rights of creditors when payable to estate. To render the proceeds of a life insurance policy payable to the estate of deceased liable for the satisfaction of a specific claim against the estate, there must have been an assignment of the fund or a definite portion thereof for that purpose, so that deceased parted with all control thereover. Evidence held insufficient to constitute such assignment. *In re Estate of Donaldson*, 174.

Sale of intestate's land: Description: Presumption. In a suit to set aside the sale of an intestate's lands, the description of the same in the order of sale will be presumed to exemplify what was intended, in the absence of an averment to the contrary. *Rice v. Bolton*, 654.

Sale of undivided interest. The unassigned distributive share of an heir in the undivided interest of his intestate in real property may be levied upon. *Byerly v. Sherman*, 447.

Wills: Interest of heirs. Where a husband and wife having no children execute a joint will, the husband transferring to the wife the right and authority over their joint property, and in case of her survival a life interest therein with remainder "to be divided equally between our lawful heirs on both sides," the wife's heirs upon her death were entitled to share in one-half of the remaining property so devised by him *per stirpes* and not *per capita*. *Knutson v. Vidders*, 511.

Wills: Participation in real estate. In the construction of the various provisions of the will and codicil in question, it is held that the widow as trustee held title to a certain eighty acres from which a bequest to one of the heirs was to be made equal to that of others, and that the balance was intended for the use of still other heirs to whom no specific devise of real estate was made. *Sperry v. Sperry*, 503.

Wrongful death: Who entitled to damages. Where a widow is made the sole beneficiary under her husband's will of his entire estate, she is entitled to all moneys collected for the wrongful death of testator, to the exclusion of their children, under Code, section 3313. *In re Estate of Cook*, 158.

ESTOPPEL

ESTOPPEL.

Adverse possession: Laches. Where one under a quit-claim deed from the supposed owners of the swamp land title, has in good faith entered upon the same, improved and occupied it for a period of ten years, a railway company in fact owning the same but having neglected for more than ten years to procure a patent or assert its rights knowing of the adverse claim and occupancy, is estopped by its laches from thereafter claiming the land. *Iowa Railroad Land Co. v. Fehring*, 1.

County bridges: Acceptance. The acceptance of a county bridge in ignorance of the fact that the same was not constructed in accordance with the contract, will not estop the county from insisting upon a breach of the contract or a recovery of damages. *Modern Steel Structural Co. v. Van Buren County*, 606.

The execution and delivery to a bridge contractor of a written acceptance of the work by individual members of the board of supervisors, made at an informal gathering for the purpose of examining the work to enable them to act intelligibly upon the matter of accepting the same, was not an act of the county; and it was not estopped thereby from relying on a breach of the contract in the construction of the bridge. *Idem*.

The public use of a bridge will not amount to an acceptance thereof and estop the county from insisting upon a breach of the contract for its construction. *Idem*.

Denial of agent's authority. Where an agent of a mutual insurance company, having authority to collect contingent fees, collected a fee in excess of the legal one on an agreement with assured that he would not be liable for any further premium during the first year of the policy, and the amount thereof turned over to the insurance company exceeded the amount which it would have received if the legal contingent fee had been charged, and thereafter an assessment was made not greater than the excess over the legal contingent fee in the hands of the company; it is held that the association could not defend a suit on the policy on the ground of nonpayment of the assessment as it was estopped to deny the agent's authority to collect the excessive contingent fee, and had funds in its hands to satisfy the assessment. *Younghoe v. Insurance Co.*, 374.

Dismissal of actions. The denial of a count of the petition, tender of the amount claimed and offer to confess judgment

ESTOPPEL Continued

therefor, which are refused, will not preclude the right of plaintiff to dismiss as to that count at any time before judgment; nor will it amount to a ratification or work an estoppel. *Continental Insurance Co. v. Clark & Cressler*, 274.

Estates of decedents. Where heirs knowingly accept the proceeds of an unauthorized sale of devised land, for full value, they are thereafter estopped from asserting an interest in the land, in the absence of a showing that the money was received under either a misapprehension of their rights or an offer to return the same. *Knutson v. Vidders*, 511.

Fraud. A grantor who through fraud was induced to convey her land for an inadequate price, is not estopped from setting up the fraud against a subsequent purchaser who had knowledge of and participated therein. *Jordan v. Cathcart*, 600.

Fraudulent act of agent. A county cannot be estopped by the acts of its representative appointed to look after the construction of bridges, who, through collusion with the contractors, perpetrates a fraud on the county by the substitution of materials inferior to that called for by the contract. *Modern Steel Structural Co. v. Van Buren County*, 606.

Insurance: Interest of mortgagee in possession. Where a mortgagee in possession of a stock of goods insures his interest and the policy is renewed indicating a continuance of the business, the company cannot insist that the insured had no interest at the time of the loss, on the ground that the proceeds of sales equaled the debt, the owner having agreed with the mortgagee that the store should be kept a going concern and the net profits applied on the debt. *Dalton v. Insurance Co.*, 377.

Partial payment: Acceptance. A board of supervisors had no authority under Code of 1897 to reduce the bill of a physician for attending a smallpox patient, where the same had been audited and allowed by the board of health, and the acceptance of a portion of the sum did not bar a claim for the balance, in the absence of agreement to that effect. *Resner v. Carroll County*, 423.

Partial payments by a county auditor on a contract on the order of a single member of the board of supervisors and without knowledge of the contractor's default in construction, will not estop the county from asserting its claim for damages based on the contractor's breach of the contract. *Modern Steel Structural Co. v. Van Buren County*, 606.

Pleading. No matter what the evidence may show in support of an estoppel, if not pleaded it is unavailing. In the instant

ESTOPPEL Continued

case the evidence fails to show that one landowner was estopped as against another from filling a drainage ditch. *Schofield v. Cooper*, 334.

Representations of agent. The representations of an agent as to title, who is authorized simply to sell, will not work an estoppel where there is no claim that he knew the purpose of the inquiry, or that his response was to be relied upon, or that the information was given in bad faith. *Iowa Railroad Land Co. v. Fehring*, 1.

Taxation. Where the assessment rolls inform a taxpayer that he need only list such liabilities as he desires to offset against his moneys and credits, he is not estopped in a proceeding to assess omitted property, from making an itemized statement of his indebtedness for each year, for the purpose of showing a larger amount than contained in the assessment rolls. *Schoonover v. Pitcina*, 261.

Where the president of a national bank loaned bank money on real estate security in his own name, thereafter assigning the notes only to the bank, the mortgages securing the same were not taxable to such president as moneys and credits; nor was he estopped from claiming that the same were bank property because the transaction amounted to an evasion of the federal banking law. *Idem*.

The payment of an installment of a void assessment by one under whom plaintiff claims title, will not estop him from contesting the validity of the tax; nor will the fact that plaintiff's remote grantor took title "subject to all incumbrances of record" operate as an estoppel against him. *Carter v. Cemansky*, 506.

Unauthorized act of public officers. No act of an engineer appointed by the county to supervise the construction of bridges, nor of an individual member of the board of supervisors by which a contractor was permitted to erect less valuable structures than provided by the contract, will stop the county from claiming damages for the default as against the contractor or any one claiming under him. *Modern Steel Structural Co. v. Van Buren County*, 606.

One dealing with a municipal corporation is bound to take notice of the statutory limitations upon its power, and the unauthorized act of a city council in contracting for sewerage will not estop the city from denying liability therefor, notwithstanding the implied representations of authority so to

ESTOPPEL Continued

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EVIDENCE

do; nor is a *quantum meruit* recovery in such cases authorized. *Citizens' Bank of Des Moines v. City of Spencer*, 101.

Wills: Devise in lieu of dower: Election. Under the Code of 1873, the one-third interest of a widow in the real estate of her husband was not affected by his will giving her a life estate in lieu of dower, unless she consented thereto by an election entered of record within six months after notice to her by interested parties of the provisions of the will; nor would the management of the entire estate and receipt of rents and profits during her natural life work an estoppel. *Byerly v. Sherman*, 447.

EVIDENCE. SEE CRIMINAL LAW EVIDENCE.

RELEVANCY AND MATERIALITY.

Evidence which is competent for any purpose is admissible, as its application may be limited by appropriate instruction. *Boddy v. Henry*, 31.

Admissions. In an action against a railway company for damage caused by fire, it is competent to permit plaintiff to testify that a letter written by him to the company definitely stating the amount of his claim was in fact written to secure a compromise and not intended as an accurate statement of his damage, as affecting its weight as an admission. *Castner v. Railway Co.*, 581.

A deliberate written statement over a party's own signature inconsistent with a subsequent claim is provable not merely to discredit his testimony but as substantive proof against him, and is not subject to the rule governing verbal admissions. *Idem.*

Agent's declarations. In a personal injury action, the statements of an agent of the defendant relating to the accident, not made while engaged in the performance of some duty pertaining to the matter to which the statements relate, and which involve a conclusion that the plaintiff was not guilty of negligence, were inadmissible in proving plaintiff's case and are held prejudicial, although under the record the same were competent on rebuttal. *Ahlquist v. Iron Works*, 67.

Breach of warranty. The actual capacity of an animal for breeding purposes as demonstrated subsequent to a sale, may be shown in an action for the breach of a warranty that he was a sure foal getter. *Wingate v. Johnson*, 154.

Confession. Oral testimony of a confession is not competent, where the confession was reduced to writing and signed, but

EVIDENCE Continued

its admission, was not reversible error where the writing afterward admitted, substantiated the oral statements. *State v. Usher*, 287.

Contempt. In a contempt proceeding for attempting to influence a juror, the admission of a transcript of evidence taken upon the trial of another cause, based largely upon the same state of facts, which included a transcript of testimony before a committee of the bar association, was error, the defendant being entitled to a trial under the statute, and, not having been a party to the other case nor the committee investigation, such matters were hearsay and inadmissible. *Hunter v. District Court*, 357.

Conversations. In an action for the death of a railroad contractor, evidence of conversations between a train dispatcher and a telegraph operator with reference to requiring trains to slow down as they approached the work, was inadmissible on the question of the company's negligence, it appearing that the dispatcher was connected with another division of the road and there being no showing of authority or that anyone in authority had knowledge of the work. *Carpenter v. Railway Co.*, 94.

Cross-examination. The testimony on cross-examination of a witness for the State which is foreign to his testimony in chief should be excluded. *State v. Usher*, 287.

Custom. The testimony of a witness on the question of a custom, that he had read of the same, was not prejudicial where the existence of the custom was not disputed. *Roupke v. Grain Co.*, 632.

Damages. Where the plaintiff sought to show that his meadow had been permanently injured by fire which consumed the grass, it was competent for defendant to prove that land some distance away which had been burned over at about the same time was uninjured, although not shown to have been similarly situated. *Castner v. Railway Co.*, 581.

Where it appeared that the agents of an insurance company recommended the payment of a loss in full, the amount of the adjustment was competent evidence of the company's loss in an action against the agents for the wrongful issuance of the policy. *Continental Ins. Co. v. Clark & Cressler*, 274.

Discovery of peril. The testimony of enginemen as to when they first discovered the peril of a trespasser on the tracks is not conclusive on the subject, but all the circumstances bearing on

EVIDENCE Continued

the question are for the consideration of the jury. *Gregory v. Railway Co.*, 230.

Distraint. In an action for damages from trespassing cattle, an explanation of why the cattle were not distrained as soon as discovered, was properly admitted. *De Mers v. Rohan*, 488.

Fraud. On an issue of fraud in the valuation of a stock of goods, a witness of experience who has familiarized himself with the stock is competent to estimate the difference between the actual wholesale cost of the entire stock as inventoried by him, and the inventory as furnished by the seller. *Sylvester v. Ammons*, 140.

On an issue as to whether the seller of a stock of goods who was to receive compensation based on the cost price, had fraudulently raised the cost mark on the goods, it was proper to permit a witness of long experience in the mercantile business to state whether the marks on the goods were the original cost marks; and that the stock was old, it appearing that the marks on the goods were fresh. *Idem*.

Hearsay. The testimony of the seller of a stock of goods that he remarked the same upon an explanation of the original cost mark from his vendors, without giving the explanation, was subject to the objection that it was hearsay; and his belief that the goods as finally marked bore the wholesale price was also inadmissible. *Idem*.

Identification of property. Where the description in a mortgage is sufficiently definite to justify its admission in evidence, the property may then be identified by extrinsic evidence. *Colean Implement Co. v. Strong*, 598.

Killing of sheep. Evidence that defendant, after learning of the loss of plaintiff's sheep and that his dog was charged with their destruction, killed the dog and remarked that "it would kill no more sheep," was admissible in an action for damages as an admission of liability. *Anderson v. Halverson*, 125.

Negligence: Change of walk. In an action for injury from an improperly constructed sidewalk, negligence on the part of a city cannot be proven by showing a change in the walk subsequent to the injury, yet if such evidence is competent for other purposes, it will not be discredited because incidentally disclosing such change. *Achey v. City of Marion*, 47.

Where the defendant in an action for a sidewalk injury introduced photographs of the place of accident, it was competent for plaintiff on rebuttal to show changes in the walk between

EVIDENCE Continued

the time of the accident and the taking of the photograph. *Idem.*

Where it appeared that the city had undertaken to light its streets, but that no light was located at the corner where the accident occurred, and the evidence was conflicting as to whether the lights were burning at the time of the injury, it was competent for plaintiff to show that the lamps were burning and did not give sufficient light at the place of accident to disclose the defective character of the walk. *Keim v. Fort Dodge*, 27.

Where plaintiff contended that she did not know of the defect in the walk until after the accident, her belief that she could safely pass over the same was immaterial. *Idem.*

Nonexpert testimony. The continuation of a rational condition of the mind of one whose acts are put in question, may be shown by the abstract testimony of a nonexpert witness as to such person's sanity. *Lucas v. McDonald & Son*, 678.

Obliteration of evidence. Evidence that defendant's employes had worked the track between the time of the accident and the inspection of the track by plaintiff, was admissible on the question of whether any evidences of the position of an animal when killed had been obliterated, and if so whether done purposely; also as bearing upon the credibility of the witnesses who did the work and who testified to the nonexistence of hoof prints. *Klay v. Railway Co.*, 671.

Parol evidence. A deed reciting a consideration cannot be shown by parol to be a trust. *Byerly v. Sherman*, 447.

Where a note is delivered as security for a prior parol agreement, its conditional delivery may be shown by parol. *Oakland Cemetery Ass'n v. Lakins*, 121.

Where a note was executed in consideration of other prior agreements between the parties, parol evidence is admissible, in an action on the note, to show the entire agreement and that it has been performed. *Idem.*

Photographs. Where photographs of the condition of a walk at the time and place of an injury are admissible in evidence, their admission simply for the purpose of illustrating a claim in argument, with a statement of the court that he would so instruct the jury, which he overlooked, was not error. *Considine v. City of Dubuque*, 284.

Quantity of land. In an action for damages based on false representations as to the quantity of land conveyed, tax receipts

EVIDENCE Continued

delivered by defendant to plaintiff stating the number of acres, were admissible as tending to show the vendor's knowledge of the amount of land. *Boddy v. Henry*, 31.

Rate of speed. A witness familiar with the running of trains and shown to have a general knowledge of their rates of speed, may give an opinion as to the speed of a particular train which he has observed. *Gregory v. Railway Co.*, 230.

Secondary evidence. Where the primary proof of notice to a city of injury from a defective walk is shown to have been lost, secondary evidence is admissible. *Considine v. City of Du-buque*, 284.

Telegrams. A telegram sent by defendant to his associate in the crime, which was shown to have been agreed upon beforehand and which corresponded with the agreement, was admissible; especially as there was evidence tending to show that defendant sent it. *State v. Richards*, 497.

Tender. Under a contract to sell thoroughbred bulls suitable for service, it is competent to show that the tender of a calf of five months was not a compliance. *Redhead Bros. v. Cattle Co.*, 410.

Transactions with decedent. A wife is not disqualified by Code, section 4604, as a witness to a transaction and communication between her husband and a party since deceased, in which she took no part but was a mere spectator. *Lucas v. McDonald & Son*, 678.

PRODUCTION AND EFFECT.

Admissions. Where there is both oral and written evidence of an admission, an instruction in relation to the weight to be given the same should point out the distinction between the two forms of proof; and where the jury is told that oral evidence of an admission should be received with caution, they should also be instructed that when the admission is clearly identified such evidence is often of a satisfactory nature. *Castner v. Railway Co.*, 581.

Admission of evidence. Error in refusing to strike an ordinance pleaded as authority to make a post mortem examination, was cured by an instruction that the ordinance gave no such authority. *Winkler v. Hawkes & Ackley*, 474.

Where there was competent evidence to support a conviction for contempt, the admission of a transcript of accused's testi-

EVIDENCE Continued

mony before an investigating committee of the bar, was not prejudicial error. *Drady v. District Court*, 345.

A cause will not be reversed because a witness has been permitted to answer leading questions or to state a conclusion, where it is apparent from the whole evidence that no prejudice resulted, although technically the rulings were incorrect. *Roush v. Gesman Bros. & Grant*, 493.

Where the ruling striking certain evidence was plain, an instruction directing the jury not to consider the same was not objectionable as failing to point out the matter stricken. *Considine v. City of Dubuque*, 284.

Breach of covenants. An action on the covenants of a deed cannot be defeated by parol evidence of the grantee's knowledge of an incumbrance. *Newburn v. Lucas*, 85.

Burden of proof. The burden of proving the intent of a son, in receiving a conveyance from his mother, to assist in defrauding her creditors, is on the creditors attacking the conveyance. *Smyth v. Hall*, 627.

The burden of proof on an issue of settlement pleaded in defense to an action for services, is on the defendant. *Barber v. Maden*, 402.

One who purchases land from a member of his family with whom he occupies a confidential relation, has the burden of showing good faith. *Jordan v. Cathcart*, 600.

Where the defendant in an action for breach of a warranty that the animal sold was a sure foal getter, pleads as a defense that its inefficiency was due to improper feed and care subsequent to the sale, he has the burden of proof on that issue. *Wingate v. Johnson*, 154.

To set aside a conveyance from husband to wife as fraudulent as to creditors, the plaintiff has the burden of showing fraud. *Clark Bros. v. Ford*, 460.

Where the execution of a note and mortgage is denied under oath, the burden is on a plaintiff seeking judgment and foreclosure, to prove the execution. Evidence is held insufficient to show that defendants signed the instruments in suit. *Damman v. Vollenweider*, 327.

Compromise and settlement. In an action to recover of an attorney money collected for a client after deducting a stated collection fee, where defendant admitted the service but denied that the collection fee as alleged was agreed upon and pleaded other and prior services performed and full settlement of the

EVIDENCE Continued

entire controversy, it was error to exclude evidence of such other service, and the error was not cured by the indirect appearance in the record of a portion of the excluded testimony. *Greenlee v. Mosna*, 330.

Damages. It was not error for the court, in computing damages sustained by a county by reason of the failure of a contractor to use the amount of material contracted for in the construction of bridges, to follow the figures given by an expert witness who was corroborated as to the amount of shortage, rather than the estimate of an officer of the company which furnished the material based upon the factory weights of which he had no personal knowledge, and who testified simply to the approximate correctness of his estimate. *Modern Steel Structural Co. v. Van Buren County*, 606.

Depositions. An objection to a deposition because of the insufficiency of the notice should be overruled where no exceptions were filed as required by Code, section 4712. *Ostenson v. Severson*, 197.

Under Code, section 3652, a party may elect to take his evidence by deposition, and he is entitled to a reasonable time in which to do so; and after issue joined, there being no order to take the evidence during the term, nor a showing of sufficient time had such order been entered, he is entitled to a continuance. *Husted v. Williams*, 634.

Examination of witnesses. On a prosecution for murder where the State's witnesses seek to avoid giving testimony tending to convict the defendant, the court may in its discretion permit the State's attorney to treat them as hostile and to cross-examine them respecting their testimony before the grand jury. *State v. Robinson*, 69.

The State may cross-examine a defendant as to his residence or occupation, although it may tend to discredit him. *State v. Wasson*, 320.

Where a physician testified that defendant employed him shortly after the burglary and paid him for his service requesting that he "keep still," it was not prejudicial error to refuse the cross-examination of the physician as to his qualification to practice medicine. *State v. Richards*, 497.

Expert evidence. The fact that a physician, called by defendant to examine plaintiff immediately after his injury, testified on plaintiff's preliminary examination as to his competency under Code, section 4608, that he found plaintiff in an unconscious

EVIDENCE Continued

condition, substantially as he had stated in defendant's prior examination, did not amount to a waiver of plaintiff's right to object that the witness was within the privilege of the statute, as the preliminary examination disclosed no new facts and the same was not affirmative proof of any material fact for plaintiff. *Nugent v. Packing Co.*, 517.

General moral character. Where a witness has testified in chief to his knowledge of the general moral character of defendant, and that it was good, he may be cross-examined on that question as to his knowledge of any matters tending to discredit his estimate of defendant's character. In the instant case, moreover, the answers on cross-examination are held to have been without prejudice. *State v. Richards*, 497.

Impeachment. It is error to permit the State to impeach a defendant on immaterial matters developed on his cross-examination. *State v. Wasson*, 320.

Where an engineer had testified that he did not sound the whistle, and denied on cross-examination that at a certain time and place and in the presence of certain persons he stated that he did give the signal, it was competent to show that he made the latter statement, not as an admission binding upon the company but for impeachment purposes. *Gregory v. Railway Co.*, 230.

Insanity. The jury is not required to accept as a verity the statements of experts based on hypothetical questions, as to the insanity of a defendant, but may weigh it as other testimony and from all of the evidence on the subject determine the fact. *State v. Humbles*, 462.

Negligence. In an action for injuries sustained by the alleged negligent operation of a street car, the offer of city ordinances regulating its operation, which are simply an affirmation of the rules of law, should be rejected. *Christy v. Stedman*, 428.

Negligence in permitting certain intervals to elapse between a physician's visits depends on the custom or practice in similar localities, and not on the custom of a particular physician in his own practice. *Tomer v. Aiken*, 114.

Negligence of a physician cannot be predicated on a failure to effect a cure of a dislocated shoulder bone, where it is shown that favorable results are not always obtained under any form of treatment. *Idem*.

An objection to questions in an action for negligence, that they call for evidence of distinct prior acts of negligence, cannot be

EVIDENCE Continued

urged for the first time on appeal. *Gregory v. Railway Co.*, 230.

Reformation of instruments. To reform an instrument the proof must be clear, convincing, and satisfactory. *Johnson v. Insurance Co.*, 565.

Sales. The effect of actual proof of the inefficiency of an animal as a foal getter, is not destroyed by a showing that the animal subsequently became less efficient by improper care. *Wingate v. Johnson*, 154.

Value. In an action for a breach of warranty in the sale of an animal, an inquiry of plaintiff whether he knew the fair market value of the animal had he been as plaintiff thought he was, while improper, is held not reversible error, as it appeared evident that plaintiff understood the question to be predicated upon defendant's representations. *Idem*.

PARTICULAR CASES.

Assumption of risk. Where the unsafety of the place to work provided by the master can be discovered through a casual inspection by the servant, he is presumed to have a knowledge thereof and assumes the risk incident thereto. Under the evidence, it is held that a mine employé assumed the risk arising from an unballasted track. *Flockhart v. Coal Co.*, 576.

Contempt. In a proceeding to punish for contempt an attempt to influence the verdict of a juror, the evidence is reviewed and held sufficient to support a judgment of guilty. *Drady v. District Court*, 345.

Contracts with county: Validity. Any contract entered into by a board of supervisors to furnish the county supplies, materials, or labor, which is with or for the benefit of any member of the board, is void to the extent of such member's interest therein. Evidence held to show the contract in suit void as to the interest of a supervisor therein. *Nelson v. Harrison County*, 436. /

Deed given as security. In an action to partition the property belonging to an estate, the evidence is reviewed and held to show that a deed given deceased by one of the heirs was in fact a mortgage, and that the indebtedness secured thereby had been paid. *Ewart v. Ewart*, 219.

Drainage. The owner of lower land cannot restrain the owner above him from tiling his open ditches, on the theory simply that the location of the tile below the surface would drain a greater area more rapidly and carry additional water onto

EVIDENCE Continued

plaintiff's land which otherwise would evaporate or be absorbed, in the absence of evidence showing that the tiling increased the flow and caused actual damage. Evidence reviewed and fails to show an increased injury. *Plagge v. Mensing*, 737.

False representations. In an action for false representations as to the quantity of land, the evidence is reviewed and held sufficient to warrant a verdict that the alleged representations were made. *Boddy v. Henry*, 31.

Fraud: Undue influence. In an action to set aside a deed on the ground of mental incapacity, the evidence is reviewed and held insufficient to establish incapacity, fraud, or undue influence. *Brown v. Cole*, 711.

Fraudulent conveyances. Where a deed is procured from one of inexperience for an inadequate consideration and as the result of an undue influence growing out of a confidential relationship, it will be set aside as fraudulent. Evidence considered and held to show fraud. *Jordan v. Cathcart*, 600.

In an action for damages based on the contention that defendants entered into an unlawful combination to hinder and delay plaintiff in the collection of a judgment against another, the evidence is considered and held insufficient to show a fraudulent concealment of the judgment debtor's property. *Pieter v. Bales*, 170.

A step-father who obtains from his step-daughter barely eighteen years of age and while a member of his family, a conveyance to her interest in real property for an inadequate consideration, has the burden of negating the presumption of fraud and undue influence. The conveyance in question was obtained under circumstances entitling plaintiff to equitable relief. *Eighmy v. Brock*, 535.

Killing of stock. In an action against a railway company for the killing of a steer, resulting as alleged from a defective right-of-way fence, the evidence is reviewed and held to support a finding that the animal was upon the right-of-way and not upon the public crossing when killed. *Klay v. Railway Co.*, 671.

Life expectancy. Evidence in an action for the death of a girl two years old, that her parents were farmers and that the wages of female school teachers in that locality were from \$30.00 to \$35.00 per month, is held sufficient to take the case to the jury on the value of her life to her estate. *Gregory v. Railway Co.*, 230.

Liquor permits. An applicant for a permit to sell liquor must

EVIDENCE Continued

allege and prove that he has been lawfully conducting a pharmacy for the six months preceding, and where it appears that he has recently surrendered a permit after an action for its revocation had been instituted, he should probably be required to allege and prove that he has not knowingly made unlawful sales for two years prior to his application. Evidence held insufficient to authorize the granting of a permit. *In re Application of Smith*, 128.

Market value. In an action to recover the market value of cattle sold for breeding purposes which were tendered under the contract and refused, the defendant should be permitted to show the price at which plaintiff sold the same within a short time of the tender, as bearing on the question of their market value. *Redhead Bros v. Cattle Co.*, 410.

Medical treatment. Where the employment of a physician has been terminated, he may refuse further attendance, and such refusal, where there is no further showing save the patient was suffering the pain usual in such cases, will not justify the admission of evidence that the same amounted to improper treatment; nor under the circumstances was negligence of the attending physician shown. *Tomer v. Aiken*, 114.

In an action for the negligent treatment of a dislocated shoulder, the evidence is reviewed, and in view of the conflict, is held to present a question for the jury as to whether the method of treatment adopted was proper. *Idem*.

Negligence. In an action for the death of an employé of a telephone company caused by his coming in contact with a wire charged with electricity, through the negligence of a fellow servant sent to repair the wire, the evidence is reviewed and held to sustain a finding that the fellow servant was incompetent and that defendant had knowledge thereof. *Scott v. Telephone Co.*, 524.

A pedestrian is not required to be on the lookout for hidden dangers in the street: He is only required to walk with his eyes open observing his natural course, and in the usual manner. A finding of ordinary care is sustained. *Earl v. Cedar Rapids*, 361.

In an action for the death of a packing house employé struck by a passing car while crossing defendant's tracks in going from one building to another, the evidence is reviewed and held that he was not guilty of contributory negligence as a matter of law, in not using a crossing or in failing to look

EVIDENCE Continued

and listen for an approaching car, before going onto the tracks. *Booth v. Railway Co.*, 8.

In an action for injury at night from an alleged gutter apron, evidence that the apron was the same as those which were and for a long time prior had been in general use in the city, was admissible as bearing upon plaintiff's knowledge of the same, it appearing that she had been a resident of the city for several years and had used the walks as pedestrians usually do. *Keim v. Fort Dodge*, 27.

In an action for injuries from an abrupt approach from a street crossing to the sidewalk, the evidence of the city's negligence is reviewed and held sufficient to take the case to the jury. *Achey v. City of Marion*, 47.

In an action for injury to a brakeman, the evidence is considered and held insufficient to support a submission on the theory that the engineer was negligent in suddenly stopping his train. *Allen v. Railway Co.*, 213.

The liability of a railway company for a personal injury is dependent upon a violation of some duty which it owes the plaintiff. The evidence is reviewed and held insufficient to establish negligence, and to support a directed verdict for defendant. *Eakins v. Railway Co.*, 324.

Where plaintiff, engaged in repairing in part defendant's building, was injured in following the negligent instruction of defendant's superintendent to lower the same onto a defective brick pier constructed by other workmen, the defendant was liable for the injury in the absence of contributory negligence or assumption of risk. Evidence held to show negligence on the part of the superintendent in directing the work. *Nugent v. Packing Co.*, 517.

Although a pedestrian may not pass along a sidewalk utterly heedless of danger, yet failure to anticipate an unusual danger is not contributory negligence as a matter of law. Under the evidence plaintiff's negligence was properly submitted to the jury. *Kaiser v. Hahn Bros.*, 561.

In an action for injury to cattle at a public railway crossing, the evidence as to plaintiff's contributory negligence is held to present a question of fact for the jury. *Kuehl v. Railway Co.*, 638.

A telephone lineman was injured by coming in contact with a defectively insulated electric light wire which the defendant carried on its poles; under the evidence it is held that the

EVIDENCE Continued

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EXECUTION OF INSTRUMENTS

question of the lineman's contributory negligence was properly submitted to the jury. *Barto v. Telephone Co.*, 241.

In an action by a telephone lineman for injuries caused by a defective electric light wire carried on the poles of the telephone company, the evidence is reviewed and held to justify a submission to the jury of the issue of defendant's negligence. *Idem.*

The granting of a new trial is peculiarly a matter of discretion with the trial court and in the absence of a showing of its abuse the ruling will not be disturbed. Evidence considered and held insufficient to show an abuse of discretion. *Tschohl v. Insurance Co.*, 211.

Reformation of instruments. A mortgagee in possession of personal property has an insurable interest, and where it was the understanding that a policy should be written to cover such interest, but the agent failed to write it in conformity with the agreement, equity will reform and enforce the contract as mutually intended. Evidence reviewed and held sufficient to authorize reformation. *Dalton v. Insurance Co.*, 377.

Specific performance. In an action for specific performance of a contract to convey land, the evidence is reviewed upon which it is held that by plaintiffs' neglect to carry out the contract they had forfeited the right to specific performance and damages. *Findley v. Koch*, 131.

Equity requires of a purchaser of land the utmost good faith on his part in attempting to carry out the contract, before specific performance will be decreed at his suit, and if his delay renders performance inequitable or unjust to the seller it will be denied. Evidence held to show such delay and inaction on the part of the purchaser as to justify a refusal of specific performance. *Idem.*

Trusts. A deed absolute on its face and reciting a consideration cannot, in the absence of fraud, be shown by parol to be in trust for the grantor. *Ostenson v. Severson*, 197.

An express trust arising from placing the title to real property in a son for the benefit of the father can only be established by documentary evidence. *Hoon v. Hoon*, 391.

EXECUTION OF INSTRUMENTS.

Burden of proof: Evidence. Where the execution of a note and mortgage is denied under oath, the burden is on a plaintiff seeking judgment and foreclosure, to prove the execution.

EXECUTION OF INSTRUMENTS Continued to

FALSE REPRESENTATIONS

Evidence is held insufficient to show that defendants signed the instruments in suit. *Damman v. Vollenweider*, 327.

EXEMPTIONS.

Homesteads. Where a homestead was sold on foreclosure, and under a prior agreement a sheriff's deed was executed to be held by the grantee as security for the redemption of the property by the mortgagor, the equitable title thus acquired did not create a new homestead right but was a continuation of the original right, and the property was exempt from debts contracted subsequent to its original acquisition; and parol evidence was admissible to show such agreement. *Foster v. Rice*, 190.

Property acquired with pension money. Land purchased with pension money is exempt from execution, although a portion of the price may have been paid from the proceeds of a sale of coal rights therein, as the same constitute an interest in the land and are not the increase or produce derived from the land; and the property may be conveyed free from liability for grantor's debts. *Smyth v. Hall*, 627.

EXPECTANCY OF LIFE.

Value of life expectancy. Evidence in an action for the death of a girl two years old, that her parents were farmers and that the wages of female school teachers in that locality were from \$30.00 to \$35.00 per month, is held sufficient to take the case to the jury on the value of her life to her estate. *Gregory v. Railway Co.*, 230.

FALSE REPRESENTATIONS.

Breach of warranty: Pleadings. Where the allegations of a petition indicated an intention to rely on a breach of warranty, the further allegation that defendant knew his statements to be false, did not convert the action into one for misrepresentation and fraud. *Wingate v. Johnson*, 154.

Defenses. The defense of fraud in a suit on an insurance policy cannot be predicated on a representation in the proofs of loss that there was no suit pending or foreclosure affecting the title, although a mortgage to which the company assented had in fact gone to judgment of foreclosure prior to the loss. *Fitzgibbons v. Insurance Co.*, 52.

Evidence. In an action for false representations as to the quantity of land, the evidence is reviewed and held sufficient to war-

FALSE REPRESENTATIONS Continued

rant a verdict that the alleged representations were made. *Boddy v. Henry*, 31.

Insurance by mortgagee. A bank official having authority to loan its funds, may take as security a note and mortgage in his own name, and may insure the property as mortgagee in possession and collect the same in case of loss; and his statement in procuring insurance on the mortgaged property that he was a mortgagee, even though the funds loaned belonged to the bank, is not such a false representation of his interest in the property as to avoid the policy, especially where the agent at the time of issuing the policy was advised of the facts. *Dalton v. Insurance Co.*, 377.

Intent to deceive. In an action for false representations, an intent to deceive will be presumed from proof of the falsity of the statements and defendant's knowledge thereof; and repeated instructions placing upon plaintiff the additional burden of showing that the representations were made with intent to deceive, and omitting from the entire charge any statement that fraudulent intent would be inferred from proof of the known falsity of representations, was error. *Boddy v. Henry*, 31.

Transfer of land: Fraud: Damages. The sale by a corporation of its capital stock, its sole assets consisting of a tract of land, operated as a transfer of the land and entitled the vendee to an action for damages for false representations as to the quantity, the same as though the transfer had been by deed. *Idem.*

Quantity of land. In an action for damages based on false representations as to the quantity of land conveyed, tax receipts delivered by defendant to plaintiff stating the number of acres, were admissible as tending to show the vendor's knowledge of the amount of land. *Idem.*

Where a vendor represented the tract conveyed to contain "about" 17,000 acres when there was in fact but 15,300, such qualification did not defeat the vendee's right to damages for the false statement. *Idem.*

A refusal to guarantee the quantity or quality of property sold, is not inconsistent with a liability for false representations in respect thereto. *Idem.*

A purchaser of land may rely upon the vendor's representations as to the quantity, even though he makes a personal inspection, not amounting to an investigation to satisfy himself, from sources independent of the vendor and his agents. *Idem.*

FALSE REPRESENTATIONS Continued TO

FLOODS

Special interrogatories. It was error to submit a special interrogatory as to whether defendant guaranteed the quantity of land conveyed, where the real issue was whether defendant had made such representations that plaintiff had the right to rely thereon as a warranty. *Idem.*

FEES.

Attorney's fees. Where a fine has been imposed for the sale of liquor in violation of an injunction, the ten per cent. of the fine allowed by Code, section 2429, in addition to the reasonable fee provided for the attorney prosecuting the cause, cannot be recovered either as costs or otherwise until the fine has been collected. *McConkie v. Landt*, 317.

FENCES.

Division fences: Partition. There are but two methods of dividing partition fences, one by order of the fence viewers, and the other by written agreement as provided by Code, sections 2356 and 2361; and a division based on a mere understanding of one landowner with the tenants of the other is of no effect. *De Mers v. Rohan*, 488.

Duty to maintain. Where there has been no legal partition of a division fence, the duty of maintaining the entire fence rests on both owners alike, and neither can complain of the neglect of the other. *Idem.*

Trespassing animals. Where there has been no legal partition of a division fence, the owner of cattle which escape onto adjoining land is liable for the damage done by them. *Idem.*

FINES.

Intoxicating liquors: Attorney fees. Where a fine has been imposed for the sale of liquor in violation of an injunction, the ten per cent. of the fine allowed by Code, section 2429, in addition to the reasonable fee provided for the attorney prosecuting the cause, cannot be recovered either as costs or otherwise until the fine has been collected. *McConkie v. Landt*, 317.

An *ex parte* order in vacation for the issuance of an execution to collect, as attorney fees, ten per cent. of an uncollected fine imposed for the sale of liquor in violation of an injunction, is void for want of notice, and a suit to restrain its enforcement will lie. *Idem.*

FLOODS.

Construction of bridges. Where a railway company was authorized to construct its road over streams in such manner as not

FLOODS Continued

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FORFEITURE

to unnecessarily impede their flow and an issue of unnecessary obstruction was submitted, an instruction that defendant might, without liability, obstruct the stream so far as reasonably necessary to maintain its bridge in a safe condition, was as favorable as defendant was entitled to. *Vyse v. The Chicago, B. C. & Q. Ry. Co.*, 90.

Where an action for damage caused by flooding plaintiff's land was submitted on the theory that defendant's negligent construction of its bridge caused the overflow, and the court instructed that unless the same caused the water to flow over plaintiff's land he could not recover, failure to specifically cover the question of whether the flood which did the injury was surface water, was not error. *Idem*.

Unless the negligent act of a railway company in constructing a bridge was the producing cause in flooding plaintiff's land, it was not liable for the injury. The court's instructions when construed together, are held correct. *Idem*.

FORFEITURE.

Coal lease. In an action to declare a forfeiture of a coal mining lease on the ground of abandonment, the evidence is reviewed and held to sustain the finding of the trial court that the failure to continuously operate the mine, under the circumstances shown, was insufficient to authorize a forfeiture. *Price v. Black*, 304.

Insurance: Forfeiture of policy. A judgment of foreclosure of a mortgage covering a part only of insured property to which the company consented, will not work a forfeiture of the policy under a provision therein that the company should not be liable if suit for foreclosure be instituted or one in which the title, ownership, or possession "of the property" insured is involved or called in question. *Fitzgibbons v. Insurance Co.*, 52.

The conditions of an insurance policy which if violated render the same void, will be strictly construed and in cases of doubt will be resolved against the company, so that a contract of sale of the property which will work a forfeiture under the provisions thereof must be one which is enforceable and not a mere option or dependent upon some contingency to give it vitality. In the instant case the contract is held unenforceable. *Swank v. Insurance Co.*, 544.

The mere accumulation of interest upon a mortgage of which an insurance company was advised at the time it accepted the risk, will not work a forfeiture of a policy under a clause war-

FORFEITURE Continued

TO

FRAUD

raunting against incumbrances. *Fitzgibbons v. Insurance Co.*, 52.

Where an insurance company has funds in its hands belonging to the assured sufficient to pay an assessment, it cannot declare a forfeiture of the policy for nonpayment of such assessment. *Younghoe v. Insurance Co.*, 374.

FRAUD.

Burden of proof. One who purchases land from a member of his family with whom he occupies a confidential relation, has the burden of showing good faith. *Jordan v. Cathcart*, 600.

Contract with county. A contract for improvement of a highway made through an arrangement with and for the benefit of a member of the board of supervisors, is fraudulent and void. *Nelson v. Harrison County*, 436.

Power of supervisors. Under the statutes, the management and control of county property is entrusted to the board of supervisors, and unless its acts are in bad faith and amount to a fraud upon the county the courts will not interfere. *Idem*.

Construction of bridges: Evidence. Where a bridge contractor materially alters the plans and specifications for the construction of county bridges by reducing the amount of material therein, without the knowledge or consent of the county or its agents authorized to consent to the change, it amounts to a fraud for which the county may recover. *Modern Steel Structural Co. v. Van Buren County*, 606.

Cost price of goods: Evidence. On an issue as to whether the seller of a stock of goods who was to receive compensation based on the cost price, had fraudulently raised the cost mark on the goods, it was proper to permit a witness of long experience in the mercantile business to state whether the marks on the goods were the original cost mark; and that the stock was old, it appearing that the marks on the goods were fresh. *Sylvester v. Ammons*, 140.

On an issue of fraud in the valuation of a stock of goods, a witness of experience who has familiarized himself with the stock is competent to estimate the difference between the actual wholesale cost of the entire stock as inventoried by him, and the inventory as furnished by the seller. *Idem*.

Estoppel. A grantor who through fraud was induced to convey her land for an inadequate price, is not estopped from setting up the fraud against a subsequent purchaser who had knowledge of and participated therein. *Jordan v. Cathcart*, 600.

FRAUD Continued

A county cannot be estopped by the acts of its representative appointed to look after the construction of bridges, who, through collusion with the contractors, perpetrates a fraud on the county by the substitution of materials inferior to that called for by the contract. *Modern Steel Structural Co. v. Van Buren County*, 606.

False representations. The defense of fraud in a suit on an insurance policy cannot be predicated on a representation in the proofs of loss that there was no suit pending or foreclosure affecting the title, although a mortgage to which the company assented had in fact gone to judgment of foreclosure prior to the loss. *Fitzgibbons v. Insurance Co.*, 52.

Where defendant gave a note in consideration for a conveyance procured by him through fraud and afterward discounted the same, on cancellation of the conveyance he was only entitled to credit for the actual amount paid for the note. *Eighmy v. Brock*, 535.

Illegal issue of warrants. Warrants issued in payment of material greatly in excess of the county's need, and at exorbitant prices, and under circumstances indicating collusion and fraud, should be cancelled by the court or reduced to the proper amount, though held by a third party. *Nelson v. Harrison County*, 436.

Innocent purchaser. One who purchases property with a knowledge that his grantor procured the title thereto through fraud in which he himself participated, is not entitled to protection as an innocent purchaser. *Jordan v. Cathcart*, 600.

Innocent purchaser: Attorney and client. An attorney who has knowledge that the title to property has been procured from his client by fraud, is not a good faith purchaser in immediately procuring a conveyance to himself from his client's grantor. *Idem.*

Insurance: Wrongful issuance of policy: Liability of agent. Where insurance agents with authority to issue policies, fraudulently and negligently issue one in direct violation of the company's instructions and purposely fail to report the risk, the company may recover of the agents in case of loss, the damage sustained by reason of such disobedience. *Continental Ins. Co. v. Clark & Cressler*, 274.

The fact that an insurance company did not have sufficient time after the issuance of a policy to avail itself of a provision for cancellation prior to a loss, was not a defense available to its

FRAUD Continued

TO

FRAUDULENT CONVEYANCES

agent in an action against him for the fraudulent issuance of the policy. *Idem*.

Where it appeared that the agents of an insurance company recommended the payment of a loss in full, the amount of the adjustment was competent evidence of the company's loss in an action against the agents for the wrongful issuance of the policy. *Idem*.

Mental incapacity: Undue influence. In an action to set aside a deed on the ground of mental incapacity, the evidence is reviewed and held insufficient to establish incapacity, fraud, or undue influence. *Brown v. Cole*, 711.

Pleadings. Fraud cannot be pleaded in general terms, but the facts relied upon must be stated. *Hoon v. Hoon*, 391.

Presumption of fraud. The mere relationship of a parent and adult child will not constitute such a state of confidence as to raise a presumption of fraud, but it will be considered in connection with other facts and circumstances for the purpose of establishing a trust. *Gregory v. Bowlsby*, 588.

Ratification. The act of a grantor in a conveyance obtained by fraud, which does not amount to an intelligent assent to the conveyance after knowledge of the fraud, will not constitute a ratification. *Eighmy v. Brock*, 535.

Replevin by mortgagor: Pleadings. In a recovery of personal property claimed to have been wrongfully taken under a mortgage, it is competent to allege and prove that the mortgage was procured by fraud, and that it is without consideration. *Sylvester v. Ammons*, 140.

Unlawful combination: Evidence. In an action for damages based on the contention that defendants entered into an unlawful combination to hinder and delay plaintiff in the collection of a judgment against another, the evidence is considered and held insufficient to show a fraudulent concealment of the judgment debtor's property. *Pieter v. Bales*, 170.

FRAUDULENT CONVEYANCES.

Burden of proof. A step-father who obtains from his step-daughter barely eighteen years of age and while a member of his family, a conveyance to her interest in real property for an inadequate consideration, has the burden of negating the presumption of fraud and undue influence. The conveyance in question was obtained under circumstances entitling plaintiff to equitable relief. *Eighmy v. Brock*, 535.

FRAUDULENT CONVEYANCES Continued

The burden of proving the intent of a son, in receiving a conveyance from his mother, to assist in defrauding her creditors, is on the creditors attacking the conveyance. *Smyth v. Hall*, 627.

To set aside a conveyance from husband to wife as fraudulent as to creditors, the plaintiff has the burden of showing fraud. *Clark Bros. v. Ford*, 460.

Evidence. Where a deed is procured from one of inexperience for an inadequate consideration and as the result of an undue influence growing out of a confidential relationship, it will be set aside as fraudulent. Evidence considered and held to show fraud. *Jordan v. Cathcart*, 600.

Deed from husband to wife. The agreement between a husband and his wife's parents to reimburse her to the extent of funds advanced him for family use by the parents, will support a conveyance of property from the husband to the wife in payment thereof, irrespective of any contract between them, or the husband's insolvency. *Clark Bros. v. Ford*, 460.

Duress: Avoidance of contract. Where a divorced husband aged and enfeebled in body and mind and under temporary guardianship, is induced under circumstances indicating an unfair advantage and coercion to enter into a contract turning over a large part of his estate to a trustee for the benefit of a child, the custody of whom was awarded his divorced wife, and for whom suitable provision was made in the divorce proceeding, his heirs at law, upon his death, may have the contract cancelled. *Foote v. De Poy*, 366.

Recovery of consideration. Where defendant gave a note in consideration for a conveyance procured by him through fraud and afterward discounted the same, on cancellation of the conveyance he was only entitled to credit for the actual amount paid for the note. *Eighmy v. Brock*, 535.

Where a conveyance of an undivided one-third interest in land has been set aside as fraudulent, the plaintiff is entitled to recover one-third of the value of the whole tract. *Idem*.

Trusts. Where a father having the confidences of his children who are members of his family, by promises which he did not intend to perform induced them to convey to him their interest in land, a court of equity will decree a constructive trust in their favor. *Gregory v. Bowlsby*, 588.

Conveyances by a bankrupt can be avoided on the ground that they were given to hinder and delay creditors, only when made

INSURANCE Continued

as to title in procuring insurance, proof of a contract of purchase of the insured property, wherein the assured agreed that the title should remain in the seller until it was fully paid for, did not of itself negative an absolute sale or show a breach of the warranty of sole ownership. *Johnson v. Insurance Co.*, 565.

Contract by agent. Where an agent has authority to contract insurance on behalf of the company indemnifying the insured against loss caused by lightning, and the agent agrees to issue such a policy, the insured is not responsible for the agent's omission to correctly report the risk. *McLaughlin v. Insurance Co.*, 149.

Completion of contract by agent. An agent's authority to issue a policy of insurance continues until he has executed the policy contracted for, and the fact that he is permitted to retain the same after it is ready for delivery, while incomplete, will not render the agent the representative of the insured so as to deprive him of the authority to complete the contract. *Idem.*

Concurrent insurance. The procurement of concurrent or additional insurance without the knowledge or consent of the company then carrying a risk on the same property, which is in violation of the terms of its policy, will avoid its liability for a loss. *Johnson v. Insurance Co.*, 565.

Knowledge of agent accepting an application that the property is covered by other insurance, is binding on the company, and precludes a defense to an action on the policy based on that ground. *Idem.*

Damages: Evidence. Where it appeared that the agents of an insurance company recommended the payment of a loss in full, the amount of the adjustment was competent evidence of the company's loss in an action against the agents for the wrongful issuance of the policy. *Continental Ins. Co. v. Clark & Cressler*, 274.

Fraud. The fact that an insurance company did not have sufficient time after the issuance of a policy to avail itself of a provision for cancellation prior to a loss, was not a defense available to its agent in an action against him for the fraudulent issuance of the policy. *Idem.*

The defense of fraud in a suit on an insurance policy cannot be predicated on a representation in the proofs of loss that there was no suit pending or foreclosure affecting the title, although a mortgage to which the company assented had in fact gone

INSURANCE Continued

to judgment of foreclosure prior to the loss. *Fitzgibbons v. Insurance Co.*, 52.

A false statement in proof of loss is not a defense in an action on an insurance policy, unless it is shown that it was made with intent to deceive and that prejudice resulted. *Dalton v. Insurance Co.*, 377.

Estoppel. Where an agent of a mutual insurance company, having authority to collect contingent fees, collected a fee in excess of the legal one on an agreement with assured that he would not be liable for any further premium during the first year of the policy, and the amount thereof turned over to the insurance company exceeded the amount which it would have received if the legal contingent fee had been charged, and thereafter an assessment was made not greater than the excess over the legal contingent fee in the hands of the company; it is held that the association could not defend a suit on the policy on the ground of nonpayment of the assessment as it was estopped to deny the agent's authority to collect the excessive contingent fee, and had funds in its hands to satisfy the assessment. *Younghoe v. Insurance Co.*, 374.

Forfeiture of policy. The conditions of an insurance policy which if violated render the same void, will be strictly construed and in cases of doubt will be resolved against the company, so that a contract of sale of the property which will work a forfeiture under the provisions thereof must be one which is enforceable and not a mere option or dependent upon some contingency to give it vitality. In the instant case the contract is held unenforceable. *Swank v. Insurance Co.*, 544.

A judgment of foreclosure of a mortgage covering a part only of insured property to which the company consented, will not work a forfeiture of the policy under a provision therein that the company should not be liable if suit for foreclosure be instituted or one in which the title, ownership, or possession "of the property" insured is involved or called in question. *Fitzgibbons v. Insurance Co.*, 52.

The mere accumulation of interest upon a mortgage of which an insurance company was advised at the time it accepted the risk, will not work a forfeiture of the policy under a clause warranting against incumbrances. *Idem*.

Where an insurance company has funds in its hands belonging to the assured sufficient to pay an assessment, it cannot declare a forfeiture of the policy for nonpayment of such assessment. *Younghoe v. Insurance Co.*, 374.

HOMESTEADS Continued

TO

HUSBAND AND WIFE

demption of the property by the mortgagor, the equitable title thus acquired did not create a new homestead right but a continuation of the original right, and the property was exempt from debts contracted subsequent to its original acquisition; and parol evidence was admissible to show such agreement. *Foster v. Rice*, 190.

Sale on execution: Previously contracted debts. A debt for which a homestead may be sold on execution under Code, section 2976, is one which has become a fixed obligation, subject to enforcement prior to the acquisition of the homestead. The evidence in this case fails to show an antecedent debt such as is contemplated by the statute. *Anderson v. Kyle*, 666.

HUSBAND AND WIFE.

Action by wife. Where a wife loans her husband money from her separate estate, taking his note therefor, she has a right under Code, section 3155, to maintain an action on the same against him during coverture. *In re Estate of Deaner*, 701.

Fraudulent conveyances: Deed from husband to wife. The agreement between a husband and his wife's parents to reimburse her to the extent of funds advanced him for family use by the parents, will support a conveyance of property from the husband to the wife in payment thereof, irrespective of any contract between them, or the husband's insolvency. *Clark Bros. v. Ford*, 460.

To set aside a conveyance from husband to wife as fraudulent as to creditors, the plaintiff has the burden of showing fraud. *Idem*.

Limitation of actions. The statute of limitations will run against a debt due from a husband to his wife the same as in other cases. *In re Estate of Deaner*, 701.

Qualification of wife as witness. A wife is not disqualified by Code, section 4604, as a witness to a transaction and communication between her husband and a party since deceased, in which she took no part but was a mere spectator. *Lucas v. McDonald & Son*, 678.

Trusts. Where a wife turned her own money over to her husband, who gave his notes therefor and used the same as his own, it could not be regarded as held in trust by him in the absence of a showing that he agreed to so hold it for her. *In re Estate of Deaner*, 701.

INCUMBRANCES

TO

INJUNCTIONS

INCUMBRANCES.

Deeds: Recitals. The recital in a deed that it is "subject to all incumbrances of record" means subject to valid incumbrances. *Carter v. Cemansky*, 506.

INDICTMENT.

Sufficiency. While in general it is sufficient to charge an offense in the language of the statute, this rule does not obtain where the statute does not necessarily charge the offense named. *State v. Wasson*, 320.

An indictment for murder effected by means of a felonious administration of poison, need not allege a specific intent to kill. *State v. Robinson*, 69.

INFANTS. See **MINORS**.

INFLUENCING JUROR. See **JURORS**.

INFORMATION.

Amendment. An information before a mayor charging the violation of an ordinance prohibiting an open drinking resort on Sunday, may be amended so as to describe the place, even after an appeal to the district court. *Town of Lovilia v. Cobb*, 557.

Filing. It is not necessary that an information be marked "filed" by a magistrate, where it was sworn to before him and left with him and treated as an information in the trial of a case. *Idem*.

Verification of information. It is presumed that a mayor before whom an information was verified, was within his jurisdiction when the oath was administered. *Idem*.

INJUNCTIONS.

Action on bond. A right of action upon a bond given for the issuance of a temporary writ of injunction, will not lie until the main action has been determined. *Lacey v. Davis*, 675.

Arrest of judgment. Where a petition in an action on the bond for damages for the wrongful issuance of a temporary injunction fails to state that the main action has been determined, a motion in arrest of judgment thereon, under Code, section 3758, will lie. *Idem*.

Contract with county: Validity: Parties. The invalidity of a contract made by a county and the issuance of a warrant thereunder, cannot be determined in a suit between the county and its treasurer to restrain the payment of the warrant, to which

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TO

INNOCENT PURCHASER

the person with whom the contract was made and warrant issued was not a party. *Nelson v. Harrison County*, 436.

Fines: Collection of attorney fees. An *ex parte* order in vacation for the issuance of an execution to collect, as attorney fees, ten per cent. of an uncollected fine imposed for the sale of liquor in violation of an injunction, is void for want of notice, and a suit to restrain its enforcement will lie. *McConkie v. Landt*, 317.

Intoxicating liquors: Contempt. A decree enjoining defendant from illegally selling liquors in a certain building was not void, depriving the court of jurisdiction to punish for contempt, because reciting that defendant was not the owner of the premises during the time of such sales and that since that time the same had been sold and possession given. *Ohlrogg v. District Court*, 247.

Party walls: Chimney flues. Where a party wall is erected without request by an adjoining owner for flues or joist bearings, as provided in Code, section 2998, and chimney flues are constructed therein by the owner for his own use, a sale of an undivided one-half interest in the wall, simply, without reference to the flues, will not entitle the adjoining owner to use the same in a manner detrimental to his co-owner. *Koolbeck v. Baughn*, 194.

Special assessments. Where an assessment is void, failure to object to the proceeding before the city council will not preclude a suit to restrain collection thereof. *Gallaher v. Garland*, 206.

Where an assessment is void or where it does not appear what portion of the same might have been legally assessed, a tender thereof is not required to maintain a suit to restrain the collection. *Idem*.

INNOCENT PURCHASER.

One who purchases property with a knowledge that his grantor procured the title thereto through fraud in which he himself participated, is not entitled to protection as an innocent purchaser. *Jordan v. Cathcart*, 600.

Attorney and client. An attorney who has knowledge that the title to property has been procured from his client by fraud, is not a good faith purchaser in immediately procuring a conveyance to himself from his client's grantor. *Idem*.

Burden of proof. One who purchases land from a member of

INNOCENT PURCHASER Continued

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his family with whom he occupies a confidential relation, has the burden of showing good faith. *Idem.*

INSANITY.

Burden of proof. In a prosecution for assault with intent to commit murder, the defendant has the burden of proving the defense of insanity to the reasonable satisfaction of the jury, by a preponderance of the evidence. *State v. Humbles*, 462.

Evidence. The jury is not required to accept as a verity the statements of experts based on hypothetical questions, as to the insanity of a defendant, but may weigh it as other testimony and from all of the evidence on the subject determine the fact. *Idem.*

INSTRUCTIONS. SEE CRIMINAL LAW INSTRUCTIONS.

In a personal injury action, it is proper to submit defendant's theory of the case, though supported by the testimony of but one witness. *Christy v. Stedman*, 428.

Failure simply to fully instruct is not reversible error in the absence of a request for instructions. *Wingate v. Johnson*, 154.

Admissions. Where there is both oral and written evidence of an admission, an instruction in relation to the weight to be given the same should point out the distinction between the two forms of proof; and where the jury is told that oral evidence of an admission should be received with caution, they should also be instructed that when the admission is clearly identified such evidence is often of a satisfactory nature. *Castner v. Railway Co.*, 581.

Admission of evidence. Error in refusing to strike an ordinance pleaded as authority to make a post-mortem examination, was cured by an instruction that the ordinance gave no such authority. *Winkler v. Hawkes & Ackley*, 474.

Evidence which is competent for any purpose is admissible, as its application may be limited by appropriate instruction. *Boddy v. Henry*, 31.

Where the ruling striking certain evidence was plain, an instruction directing the jury not to consider the same was not objectionable as failing to point out the matter stricken. *Considine v. City of Dubuque*, 284.

Commissions: Division between agents. In an action between real estate agents for a division of commissions on the sale of farms turned over by the plaintiff to defendants, the court

INSTRUCTIONS Continued

charged that the plaintiff could not recover for the sale by defendants of lands not listed with him by the owner, but in view of the evidence that a son of the owner of a certain farm was authorized to list the same and in fact listed it with plaintiff, the verdict including a commission for the sale thereof is sustained. *Roush v. Gesman Bros. & Grant*, 493.

Construction of bridges: Floods. Where a railway company was authorized to construct its road over streams in such manner as not to unnecessarily impede their flow and an issue of unnecessary obstruction was submitted, an instruction that defendant might, without liability, obstruct the stream so far as reasonably necessary to maintain its bridge in a safe condition, was as favorable as defendant was entitled to. *Vyse v. The Chicago, B. & Q. Ry. Co.*, 90.

Unless the negligent act of a railway company in constructing a bridge was the producing cause in flooding plaintiff's land, it was not liable for the injury. The court's instructions when construed together, are held correct. *Idem*.

Erroneous use of words. Where the court properly charged that the negligence complained of was failure to provide adequate protection against a street excavation and that if the city failed in this respect a finding of negligence was warranted, the further instruction that if plaintiff had failed to show that the excavation, was "properly" protected he could not recover, was not misleading, as from the whole charge it was apparent the word "improperly" was intended. *Bussell v. City of Fort Dodge*, 308.

The erroneous use of the word "defendant" for "plaintiff" in an instruction was not prejudicial, where, from the instructions as a whole or the paragraph in which the error occurred, the jury could not have been misled. *Roupke v. Grain Co.*, 632.

Flight. In a prosecution for burglary, an instruction that flight is a circumstance which *prima facie* indicates guilt, is not objectionable as charging that it was presumptive evidence of guilt. *State v. Richards*, 497.

Future pain and suffering. Where there was evidence that at the time of the trial plaintiff was suffering pain from the injury, an instruction that the jury should allow such damages on account of the future pain and anguish as the evidence warranted, was correct, although the injury was not shown to be permanent. *Achey v. City of Marion*, 47.

Intent to deceive. In an action for false representations, an in-

INSTRUCTIONS Continued

tent to deceive will be presumed from proof of the falsity of the statements and defendant's knowledge thereof; and repeated instructions placing upon plaintiff the additional burden of showing that the representations were made with intent to deceive, and omitting from the entire charge any statement that fraudulent intent would be inferred from proof of the known falsity of representations, was error. *Boddy v. Henry*, 31.

Inconsistent claims. The statement of a servant made out of court should be wholly inconsistent with his claim for compensation for the balance of his term after a claimed wrongful discharge, to require an instruction on the question of his having voluntarily left the employment. *Roupke v. Grain Co.*, 632.

Killing of stock: Failure to fence. In an action for the killing of an animal claimed to have strayed upon defendant's right-of-way by reason of a defective fence, an instruction that plaintiff could only recover upon proof that the fence was out of repair, which was shown to defendant or which had existed for such a length of time that knowledge should be imputed to it, was as favorable as defendant was entitled to. *Klay v. Railway Co.*, 671.

Negligence. Where the only negligence charged was want of care on the part of the engineer in failing to observe an order and in running his train at such speed as to make a sudden stop necessary, and the evidence showed that a sudden stoppage of the train was justified by the emergency, an instruction that for plaintiff to recover he must establish by a preponderance of evidence that while in the discharge of his duties as brakeman he was thrown from the train and injured, without fault on his part, by the negligence of the engineer in making a violent stoppage of the train, was error. *Allen v. Railway Co.*, 213.

Where one relies upon defective sight as an excuse for failing to observe an obstruction upon the sidewalk, from which an injury resulted, the defendant is entitled to an instruction that corresponding caution is exacted, although only ordinary care under all the circumstances is required. *Kaiser v. Hahn Bros.*, 561.

Where an action for damage caused by flooding plaintiff's land was submitted on the theory that defendant's negligent construction of its bridge caused the overflow, and the court instructed that unless the same caused the water to flow over plaintiff's land he could not recover, failure to specifically cover the question of whether the flood which did the injury was

INSTRUCTIONS Continued

surface water, was not error. *Vyse v. The Chicago, B. & Q. Ry. Co.*, 90.

Where an employer was liable for an injury to a workman resulting from failure to provide a proper support onto which plaintiff was lowering a building, reference in the court's instructions to a failure to provide a safe place to work, which was explanatory of defendant's duty, was not misleading. *Nugent v. Packing Co.*, 517.

In determining the question of an engineer's negligence in failing to sound the whistle after discovering a child upon the track, an instruction that the jury might consider, among other things, whether an alarm would have frightened the child, and if so, whether the result would have been to cause it to remain on the track or move off, was properly given. *Gregory v. Railway Co.*, 230.

In an action for injuries to an employé working at a machine as helper, a charge that if the employer failed to use ordinary care in keeping the machine in repair, but at the time of the accident it was in a defective condition and the defect was known or on the exercise of ordinary care would have been known to the employer, then on so finding the employer was guilty of negligence, and unless they so found the verdict must be for the defendant, was not erroneous as assuming that the machine was in a defective condition. *Fries v. Axle Co.*, 138.

In an action for injuries resulting from collision with a street car, instructions directing a verdict for defendant if plaintiff failed to show freedom from contributory negligence, and enumerating the acts of negligence relied upon, except failure of the motorman to stop the car after he saw plaintiff's peril, and further charging that if the jury failed to find any of the acts of negligence, their verdict should be for defendant, were inconsistent with another charge that, though plaintiff was negligent yet defendant would be liable if its employés saw plaintiff and knew of his peril and failed to use ordinary care to prevent the injury. *Christy v. Stedman*, 428.

New trial. An instruction on the theory that an issue is in the case which is not in fact tendered by the pleadings, is ground for a new trial. *Hydinger v. Railway Co.*, 222.

Proximate cause. Under the issues, an instruction that the fact that employés of a creamery, at which place the deceased drank poison from a jug supposed to contain buttermilk, knew the jug contained poison, did not relieve defendant from the charge of negligence, provided it sold the same without labeling as

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required by law, was not objectionable as eliminating from the case the doctrine of proximate cause. *Burk v. Creamery Package Mfg. Co.*, 730.

Proximate cause. In an action for negligence, it is not error for the court to use the term "proximate cause" in an instruction, without defining it. *Idem*.

Refusal of instruction. Where the negligence charged was the improper construction of a sidewalk and the evidence tended to support the allegation, it was not error to refuse an instruction relating to negligence in failing to repair. *Achey v. City of Marion*, 47.

Replevin. In replevin of a stock of goods taken by a mortgagee in an attempt to foreclose a mortgage given for part of the purchase price, where the only issue submitted was failure of consideration, an inadvertent reference to a claimed fraud in invoicing the goods was without prejudice; and an instruction that if the seller or one in his employ changed the cost price of the goods so as to increase the mortgage debt the plaintiff could recover, was proper. *Sylvester v. Ammons*, 140.

Ordinary care. Where the court instructed generally that a pedestrian is required to use ordinary care to avoid an accident, a further instruction that if plaintiff knew of the defect in the walk or if the street was dimly lighted, she was bound to use "a greater degree of care" than if she had no knowledge of the defect or if the street was well lighted, was misleading. *Keim v. Fort Dodge*, 27.

Tender. Where plaintiff, under a contract to sell defendant a certain number of registered cattle, tendered a lot that were unregistered and therefore refused, and subsequently tendered another lot which were registered but not accepted, whereupon plaintiff brought his action for damages and his testimony as to damage was confined to the registered animals, an instruction permitting the jury to base its finding upon the first tender of which there was no evidence as to damage, was error. *Redhead Bros. v. Cattle Co.*, 410.

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Agency. One who upon his own request submits the application of a property owner for fire insurance to a foreign agency, is the agent of the company accepting the same and issuing a policy, under Code, section 1749. *Hartman & Daniels v. Hollowell*, 643.

Breach of warranty. On an issue of fraudulent representation

INSURANCE Continued

as to title in procuring insurance, proof of a contract of purchase of the insured property, wherein the assured agreed that the title should remain in the seller until it was fully paid for, did not of itself negative an absolute sale or show a breach of the warranty of sole ownership. *Johnson v. Insurance Co.*, 565.

Contract by agent. Where an agent has authority to contract insurance on behalf of the company indemnifying the insured against loss caused by lightning, and the agent agrees to issue such a policy, the insured is not responsible for the agent's omission to correctly report the risk. *McLaughlin v. Insurance Co.*, 149.

Completion of contract by agent. An agent's authority to issue a policy of insurance continues until he has executed the policy contracted for, and the fact that he is permitted to retain the same after it is ready for delivery, while incomplete, will not render the agent the representative of the insured so as to deprive him of the authority to complete the contract. *Idem.*

Concurrent insurance. The procurement of concurrent or additional insurance without the knowledge or consent of the company then carrying a risk on the same property, which is in violation of the terms of its policy, will avoid its liability for a loss. *Johnson v. Insurance Co.*, 565.

Knowledge of agent accepting an application that the property is covered by other insurance, is binding on the company, and precludes a defense to an action on the policy based on that ground. *Idem.*

Damages: Evidence. Where it appeared that the agents of an insurance company recommended the payment of a loss in full, the amount of the adjustment was competent evidence of the company's loss in an action against the agents for the wrongful issuance of the policy. *Continental Ins. Co. v. Clark & Cressler*, 274.

Fraud. The fact that an insurance company did not have sufficient time after the issuance of a policy to avail itself of a provision for cancellation prior to a loss, was not a defense available to its agent in an action against him for the fraudulent issuance of the policy. *Idem.*

The defense of fraud in a suit on an insurance policy cannot be predicated on a representation in the proofs of loss that there was no suit pending or foreclosure affecting the title, although a mortgage to which the company assented had in fact gone

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to judgment of foreclosure prior to the loss. *Fitzgibbons v. Insurance Co.*, 52.

A false statement in proof of loss is not a defense in an action on an insurance policy, unless it is shown that it was made with intent to deceive and that prejudice resulted. *Dalton v. Insurance Co.*, 377.

Estoppel. Where an agent of a mutual insurance company, having authority to collect contingent fees, collected a fee in excess of the legal one on an agreement with assured that he would not be liable for any further premium during the first year of the policy, and the amount thereof turned over to the insurance company exceeded the amount which it would have received if the legal contingent fee had been charged, and thereafter an assessment was made not greater than the excess over the legal contingent fee in the hands of the company; it is held that the association could not defend a suit on the policy on the ground of nonpayment of the assessment as it was estopped to deny the agent's authority to collect the excessive contingent fee, and had funds in its hands to satisfy the assessment. *Younghoe v. Insurance Co.*, 374.

Forfeiture of policy. The conditions of an insurance policy which if violated render the same void, will be strictly construed and in cases of doubt will be resolved against the company, so that a contract of sale of the property which will work a forfeiture under the provisions thereof must be one which is enforceable and not a mere option or dependent upon some contingency to give it vitality. In the instant case the contract is held unenforceable. *Swank v. Insurance Co.*, 544.

A judgment of foreclosure of a mortgage covering a part only of insured property to which the company consented, will not work a forfeiture of the policy under a provision therein that the company should not be liable if suit for foreclosure be instituted or one in which the title, ownership, or possession "of the property" insured is involved or called in question. *Fitzgibbons v. Insurance Co.*, 52.

The mere accumulation of interest upon a mortgage of which an insurance company was advised at the time it accepted the risk, will not work a forfeiture of the policy under a clause warranting against incumbrances. *Idem.*

Where an insurance company has funds in its hands belonging to the assured sufficient to pay an assessment, it cannot declare a forfeiture of the policy for nonpayment of such assessment. *Younghoe v. Insurance Co.*, 374.

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Under Code, section 1743, the failure of an insured to keep a set of books, or the violation of an iron safe clause, will not defeat recovery where there is neither pleading nor proof that such neglect contributed to the loss. *Johnson v. Insurance Co.*, 565.

Interest of mortgagee in possession. Where a mortgagee in possession of a stock of goods insures his interest and the policy is renewed indicating a continuance of the business, the company cannot insist that the insured had no interest at the time of the loss, on the ground that the proceeds of sales equaled the debt, the owner having agreed with the mortgagee that the store should be kept a going concern and the net profits applied on the debt. *Dalton v. Insurance Co.*, 377.

A bank official having authority to loan its funds, may take as security a note and mortgage in his own name, and may insure the property as mortgagee in possession and collect the same in case of loss; and his statement in procuring insurance on the mortgaged property that he was a mortgagee, even though the funds loaned belonged to the bank, is not such a false representation of his interest in the property as to avoid the policy, especially where the agent at the time of issuing the policy was advised of the facts. *Idem*.

Lightning clause. Where the agent issuing an insurance policy omitted by inadvertence to attach a clause indemnifying the assured against loss by lightning, according to agreement, he had authority to insert such a clause after loss occurred. *McLaughlin v. Insurance Co.*, 149.

Presumption of authority to insure. The assured may rightfully assume that a company issuing a policy of insurance is authorized to do business in this State, in the absence of information to the contrary. *Hartman & Daniels v. Hollowell*, 643.

Reformation of policy. Where a provision in a policy for concurrent insurance has been omitted by oversight, equity will reform the contract to correspond with the understanding of the parties. *Dalton v. Insurance Co.*, 377.

A mortgagee in possession of personal property has an insurable interest, and where it was the understanding that a policy should be written to cover such interest, but the agent failed to write it in conformity with the agreement, equity will reform and enforce the contract as mutually intended. Evidence reviewed and held sufficient to authorize reformation. *Idem*.

Rights of creditors when payable to estate. To render the proceeds of a life insurance policy payable to the estate of deceased liable for the satisfaction of a specific claim against

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the estate, there must have been an assignment of the fund or a definite portion thereof for that purpose, so that deceased parted with all control thereover. Evidence held insufficient to constitute such assignment. *In re Estate of Donaldson*, 174.

Transaction of business of foreign companies: Statutes. Issuance and delivery of a fire policy by a foreign insurance company, covering property in this State, constitute the transaction of business in the State within the meaning of the statutes regulating the insurance business. *Hartman & Daniels v. Hollowell*, 643.

Unauthorized insurance: Liability of agent. Under the statutes regulating the transaction of insurance business, an agent effecting insurance on property in this State with a foreign company which is insolvent and unauthorized to do business in Iowa, is personally liable to the assured in case of loss, whether he actually knew of the insolvency of the company or not. *Idem*.

In an action against an insurance agent for wrongfully writing a risk at a lower rate than authorized and failing to report the same and the evidence tended to show that the company would have cancelled the risk had it known of it, the measure of damages is the total loss sustained thereby. *Continental Insurance Co. v. Clark & Cressler*, 274.

Where insurance agents with authority to issue policies, fraudulently and negligently issue one in direct violation of the company's instructions and purposely fail to report the risk, the company may recover of the agents in case of loss, the damage sustained by reason of such disobedience. *Idem*.

Waiver of conditions. Code, section 1750, providing that any officer, agent or other representative of an insurance company who may solicit insurance or transact the business generally of such company shall be held to be an agent with authority to transact all business within the scope of his employment, prohibits any limitations upon the authority of an agent having the powers enumerated in said section to transact all business within the apparent scope or usual extent of his employment; and under this section a local agent may waive the conditions of a policy and consent to an incumbrance upon the property. *Liquid Carbonic Acid Mfg. Co. v. Insurance Co.*, 225.

Where the delivery of an insurance policy and the payment of a contingent fee are contemporaneous acts, the assured is not

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chargeable with knowledge of the provisions of the policy at the time the fee was paid. *Younghoe v. Insurance Co.*, 374.

INTENT.

A false statement in proof of loss is not a defense in an action on an insurance policy, unless it is shown that it was made with intent to deceive and that prejudice resulted. *Dalton v. Insurance Co.*, 377.

Instructions. In an action for false representations, an intent to deceive will be presumed from proof of the falsity of the statements and defendant's knowledge thereof; and repeated instructions placing upon plaintiff the additional burden of showing that the representations were made with intent to deceive, and omitting from the entire charge any statement that fraudulent intent would be inferred from proof of the known falsity of representations, was error. *Boddy v. Henry*, 31.

INTEREST.

Interest may be recovered in a suit on a liquor dealer's bond. *O'Brien County v. Mahon*, 539.

INTERROGATORIES

Failure to answer: Judgment. Code, section 3610, does not contemplate a summary entry of judgment because of indefinite or unsatisfactory answers by a municipal corporation to interrogatories attached to a pleading; and such an order will not generally be entered without an opportunity to the delinquent party to correct the fault. *Modern Steel Structural Co. v. Van Buren County*, 606.

INTOXICATING LIQUORS.

Application for permit. The trial of an application for a liquor permit, to which objections are filed, is a special action or proceeding in which the remonstrants have such an interest as entitle them to appeal from an order granting the permit. *In re Application of Smith*, 128.

An applicant for a permit to sell liquor must allege and prove that he has been lawfully conducting a pharmacy for the six months preceding, and where it appears that he has recently surrendered a permit after an action for its revocation had been instituted, he should probably be required to allege and

INTOXICATING LIQUORS Continued

prove that he has not knowingly made unlawful sales for two years prior to his application. Evidence held insufficient to authorize the granting of a permit. *Idem.*

Failure of a liquor dealer's bond to describe the place where the business is to be conducted, will not invalidate the bond. *O'Brien County v. Mahon*, 539.

A liquor dealer's bond given to secure immunity under the mulct law, which is accepted as sufficient and operated under, is supported by a sufficient consideration. *Idem.*

The sureties on a saloon keeper's bond are liable for the payment of the mulct tax. *Idem.*

The sureties on a liquor dealer's bond are liable for the full tax for the quarter in which the obligation arose. *Idem.*

Mere failure to collect a mulct tax when due will not discharge the sureties on a liquor dealer's bond. *Idem.*

A liquor dealer's bond providing for a compliance with the laws of the State is valid, although the statute in force at its execution was repealed or superseded by the Code of 1897; and would be good as a common law obligation even though not in conformity with the statute. *Idem.*

Contempt: Procedure. Under the Code, a denial by the accused of the contempt charged does not operate, as at common law, to purge him of the offense, but the court is to determine by a trial the facts put in issue by the answer; and a contrary view is not indicated by the provisions of Code, section 2407, relating to the violation of a liquor nuisance injunction. *Drady v. District Court*, 345.

A decree enjoining defendant from illegally selling liquors in a certain building was not void, depriving the court of jurisdiction to punish for contempt, because reciting that defendant was not the owner of the premises during the time of such sales and that since that time the same had been sold and possession given. *Ohlrogg v. District Court*, 247.

Fines: Collection of attorney fees. An *ex parte* order in vacation for the issuance of an execution to collect, as attorney fees, ten per cent. of an uncollected fine imposed for the sale of liquor in violation of an injunction, is void for want of notice, and a suit to restrain its enforcement will lie. *McConkie v. Landt*, 317.

Where a fine has been imposed for the sale of liquor in violation of an injunction, the ten per cent. of the fine allowed by Code, section 2429, in addition to the reasonable fee provided

INTOXICATING LIQUORS *Continued*

TO

JUDGMENTS

for the attorney prosecuting the cause, cannot be recovered either as costs or otherwise until the fine has been collected.
Idem.

Information. An information before a mayor charging the violation of an ordinance prohibiting an open drinking resort on Sunday, may be amended so as to describe the place, even after an appeal to the district court. *Town of Lovilia v. Cobb*, 557.

Interest. Interest may be recovered in a suit on a liquor dealer's bond. *O'Brien County v. Mahon*, 539.

Mulct tax: Compensation of county treasurer. That portion of the regular annual mulct tax which a county is required by law to pay to a city, is not subject to the county treasurer's charge of three fourths of one per cent. for collection, as provided in Code, section 490, but any additional tax imposed by the city for its benefits and collected by the treasurer should pay this commission. *City of Waverly v. Bremer County*, 98.

The county may recover the entire mulct tax, though one-half is to go to the municipality. *O'Brien County v. Mahon*, 539.

Ordinances. An ordinance prohibiting the keeping of a place, resorted to for the purpose of drinking liquors, open on Sunday, is comprehended in a title "an ordinance concerning misdemeanors." *Town of Lovilia v. Cobb*, 557.

A city has power under Code, section 680, to enact an ordinance prohibiting the keeping of a place of business, resorted to for the purpose of drinking intoxicating liquor, open on Sunday.
Idem.

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Adjudication. The overruling of a motion to set aside an order discharging a receiver, because not the proper remedy, is not a bar to a petition for the same purpose. *Williams v. Loan Co.*, 22.

Appeal: Plea in bar. One who has not pleaded a judgment in bar of the action cannot raise the question on appeal. *Newburn v. Lucas*, 85.

Approval of void contract. An order of court approving a void contract is of no effect, where its validity was not adjudicated. *Foote v. De Poy*, 366.

Contempt: Procedure. An application to punish for contempt may properly be made in a pending case, rather than by an independent proceeding in the name of the State, and the court will take notice of the records of prior proceedings in the

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case without their introduction in evidence. *Ferguson v. Wheeler*, 111.

Constitutional law: Classification: Uniformity: Due process of law. The act of the legislature limiting the time within which actions should be commenced to enforce all judgments rendered between the taking effect of the Code of 1873 and the Code of 1897, is not unconstitutional for nonuniformity, as it applies to all such judgments as a class, and the act simply recognizes a classification made by prior legislation; nor is it void as depriving the judgment holder of rights without due process of law. *Wooster v. Bateman*, 552.

Defaults. The order of the trial court in setting aside a default will not be disturbed on appeal unless a clear abuse of discretion is shown. *Carver v. Seevers & Bryan*, 669.

Setting aside a default to permit a defense on the merits is a matter largely within the discretion of the trial court, and its order will not be disturbed except in cases of abuse. *Klepfer v. City of Keokuk*, 592.

In an action for a personal injury, an affidavit of merits in support of a motion to set aside a default, which alleges a belief that the accident was the result of plaintiff's negligence and not that of defendant, is sufficient without setting out all the facts upon which the conclusion rests. *Idem*.

An inferior court has jurisdiction to set aside a default judgment, notwithstanding a transcript has been filed in the district court. *Idem*.

Where time to file a substituted petition is given "until" a certain day, the day named will be excluded unless a contrary intention appears, and a default judgment taken upon a petition filed on the day so named will be set aside without the filing of an affidavit of merits and an answer. *Carver v. Seevers & Bryan*, 669.

Effect of transcript. The filing of the transcript of a judgment in district court makes it a judgment of that court under Code, section 273, simply for the purpose of enforcement. *Klepfer v. City of Keokuk*, 592.

Interrogatories: Failure to answer. Code, section 3610, does not contemplate a summary entry of judgment because of indefinite or unsatisfactory answers by a municipal corporation to interrogatories attached to a pleading; and such an order will not generally be entered without an opportunity to the delin-

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JUDGMENTS Continued

TO

JUDICIAL SALE

quent party to correct the fault. *Modern Steel Structural Co. v. Van Buren County*, 606.

Judgment for costs: Discharge in bankruptcy. A judgment for costs in a criminal case is not a debt "due for taxes" within the exception of the bankruptcy law of 1898 and is satisfied by the discharge of the judgment debtor in bankruptcy. *Olds v. Forrester*, 456.

Judgment on the pleadings. A verified answer and counterclaim will not be taken as true and judgment rendered thereon, because of an unverified reply. The proper practice is a motion to strike. *Newburn v. Lucas*, 85.

Jurisdiction: Presumption. Where the certificate to a judgment record of another State shows that the judgment was rendered by a court of record with a clerk and seal, it will be presumed that the court had jurisdiction of the parties and the subject matter, until the contrary is shown. *Woodworth v. McKee*, 714.

Limitation of action. By Code, sections 3439 and 3447, the time during which an action may be maintained on a judgment rendered in a court of record, is limited to the five years intervening between the expiration of fifteen years from its rendition and the twenty years therefrom when the same is barred. *Wooster v. Bateman*, 552.

Void judgment: Injunction. Where a justice erroneously transfers a cause to the district court, and after the lapse of fourteen days assumes to further proceed with the case without the service of legal notice, a judgment subsequently entered by him is void for want of jurisdiction, and its enforcement may be enjoined without a showing of merits. *Schiele v. Thede*, 398.

JUDICIAL SALE.

What constitutes a homestead: Liability for debts. The homestead law is to be liberally construed, and under this rule the residence of a divorced husband which he himself, and an adult daughter who came to live with him as his housekeeper at the time of the divorce, occupied until his death, constituted his homestead in the absence of satisfactory proof that he was obligated to pay the daughter's service; and the same was exempt from judicial sale for his debts, or those of an heir who had conveyed his interest therein. *Fox v. National Bank*, 481.

JUDICIAL SALE Continued

TO

JURISDICTION

Homesteads: Sale on execution: Previously contracted debts.

A debt for which a homestead may be sold on execution under Code, section 2976, is one which has become a fixed obligation, subject to enforcement prior to the acquisition of the homestead. The evidence in this case fails to show an antecedent debt such as is contemplated by the statute. *Anderson v. Kyle*, 666.

Sale of undivided interest. The unassigned distributive share of an heir in the undivided interest of his intestate in real property may be levied upon. *Byerly v. Sherman*, 447.

JURISDICTION.

Appeal: Sufficiency of notice. The statement in an abstract that appellant gave notice of appeal to defendant and the clerk of the court from which the appeal was taken, and secured his fees, is sufficient to confer jurisdiction over a simple statement in denial that the appeal was perfected as required by law and that the notice of appeal was insufficient. *Dolan v. Blast Furnace Co.*, 254.

Contempt. The district court of Pottawattamie county sitting at Council Bluffs has jurisdiction to enter an order of punishment for contempt in a case pending in the same court at Avoca, in said county, where the parties stipulate that the contempt proceedings shall be heard at that time and place. *Ferguson v. Wheeler*, 111.

Costs. The district court has no jurisdiction to tax the costs of printing an appeal or the fees of the clerk of the supreme court. *Berkey v. Thompson*, Judge, 394.

The right to recover costs is to be determined by the judgment, and during the pendency of an appeal the district court has no jurisdiction to modify or correct the same, and generally has no authority in an equity action to pass upon a motion to re-tax after an appeal has been taken. *Idem*.

The expense of preparing a translation of the shorthand reporter's notes for use on appeal should ordinarily be taxed by the appellate court; and so long as the case is pending on appeal the district court has no jurisdiction to tax any costs which may be taxed in the supreme court. *Idem*.

Default judgments: Setting aside. An inferior court has jurisdiction to set aside a default judgment, notwithstanding a transcript has been filed in the district court. *Klepfer v. City of Keokuk*, 592.

Justices of the peace. After a justice of the peace has made an

JURISDICTION Continued

TO

JURORS

order finally disposing of a case pending before him he loses jurisdiction, and the parties are not required to take notice of further orders entered by him without the service of a new notice as provided by law restoring his jurisdiction. *Schiele v. Thede*, 398.

Notice of receiver's final report. Where a notice of hearing on a receiver's final report is signed by no one and addressed to no one, and the order fixing the time of hearing of the report and for service of the notice is not entered of record until after the service is made, there is an entire lack of notice, and the court is without jurisdiction to enter an order of discharge based thereon. *Williams v. Loan Co.*, 22.

Presumption. Where the certificate to a judgment record of another State shows that the judgment was rendered by a court of record with a clerk and seal, it will be presumed that the court had jurisdiction of the parties and the subject matter, until the contrary is shown. *Woodworth v. McKee*, 714.

Specific performance. The courts of this State have jurisdiction to decree specific performance of a contract for the sale of land situated in another State, where the parties to the action are residents of Iowa. *Rea v. Ferguson*, 704.

Verification of information. It is presumed that a mayor before whom an information was verified, was within his jurisdiction when the oath was administered. *Town of Lovilia v. Cobb*, 557.

Void judgment: Injunction. Where a justice erroneously transfers a cause to the district court, and after the lapse of fourteen days assumes to further proceed with the case without the service of legal notice, a judgment subsequently entered by him is void for want of jurisdiction, and its enforcement may be enjoined without a showing of merits. *Schiele v. Thede*, 398.

JURORS.

Challenge to jurors. The appellate court will not presume prejudice from the ruling of the trial court in excusing a juror because wrongly named; nor will prejudice arise from a refusal to excuse another from the same panel for the same reason, where the objection was not made until after the exercise of a peremptory challenge. *State v. Pray*, 249.

Swearing of the jury in a criminal case before the defendant had exhausted his peremptory challenges, was not reversible

JURORS Continued

TO

JUSTICES OF THE PEACE

error, where he made no objection nor accepted thereto. *State v. Icenbice*, 16.

A defendant held to answer before the return of an indictment who fails to appear and challenge the grand jury, although at an adjourned term, waives any objection to the selection and drawing of the jury. *State v. McPherson*, 77.

Influencing juror. The court has power under Code, section 4461, to punish for contempt an attempt to influence a juror of the general panel, made prior to the time he was sworn to try the particular case. *Marvin v. District Court*, 355.

Misconduct of juror. Proof that jurymen, while deliberating upon the case, stated their personal knowledge of facts relevant to the issues, and that outsiders discussed the case in the presence of members of the jury in such a manner as to create prejudice, will authorize a new trial. *Hydinger v. Railway Co.*, 222.

Waiver of objection to juror. An objection to a juror because of his relation to the prosecuting witness in a criminal action, which becomes known to defendant's counsel during the trial, is waived by failure to call attention to the fact prior to the verdict. *State v. Pray*, 249.

JUSTICES OF THE PEACE.

Change of venue: Waiver of error. It is error for a justice to grant a change of venue after the determination of a motion to strike from the answer and to make it more specific, as the same constitutes a commencement of the trial within the meaning of Code, section 4502; and the error is not waived by proceeding to trial. *Columbus Junction Tel. Co. v. Overholt*, 579.

Information: Filing. It is not necessary that an information be marked "filed" by a magistrate, where it was sworn to before him and left with him and treated as an information in the trial of the case. *Town of Lovilia v. Cobb*, 557.

Jurisdiction. After a justice of the peace has made an order finally disposing of a case pending before him he loses jurisdiction, and the parties are not required to take notice of further orders entered by him without the service of a new notice as provided by law restoring his jurisdiction. *Schiele v. Thede*, 398.

Void judgment: Injunction. Where a justice erroneously transfers a cause to the district court, and after the lapse of

JUSTICES OF THE PEACE Continued TO LANDLORD AND TENANT

fourteen days assumes to further proceed with the case without the service of legal notice, a judgment subsequently entered by him is void for want of jurisdiction, and its enforcement may be enjoined without a showing of merits. *Idem*.

LACHES.

Adverse possession: Estoppel. Where one under a quitclaim deed from the supposed owners of the swamp land title, has in good faith entered upon the same, improved and occupied it for a period of ten years, a railway company in fact owning the same but having neglected for more than ten years to procure a patent or assert its rights knowing of the adverse claim and occupancy, is estopped by its laches from thereafter claiming the land. *Iowa Railroad Land Co. v. Fehring*, 1.

Equity requires of a purchaser of land the utmost good faith on his part in attempting to carry out the contract, before specific performance will be decreed at his suit, and if his delay renders performance inequitable or unjust to the seller it will be denied. Evidence held to show such delay and inaction on the part of the purchaser as to justify a refusal of specific performance. *Findley v. Koch*, 131.

Unreasonable delay in insisting on performance, and negligence in carrying out the contract, will defeat specific performance, although time is not specifically made the essence of the contract. *Idem*.

A purchaser of land who is not entitled to specific performance of the contract because of his lack of diligence in asserting his rights thereunder, is not entitled to damages for the vendor's refusal to convey, after the lapse of a reasonable time. *Idem*.

Municipal assessments: Benefits. Where a municipal assessment for grading a street is wholly void, the property owner is not liable for benefits conferred; nor will delay in suing to quiet title against the assessment constitute a defense to that action. *Carter v. Cemansky*, 506.

LANDLORD AND TENANT.

Pleadings: Amendment: Discretion of court. In an action to restrain the removal of fixtures by a tenant, it was not an abuse of discretion to strike from defendant's amended answer allegations alleging a new cause of action for conversion of the fixtures, by way of a counterclaim, so far as the same asked for affirmative relief, and permitting it to stand as to the defensive matter. *Daly v. Simonson*, 716.

LANDLORD AND TENANT Continued TO

LIBEL

Reformation of instruments. Where a lessor, in preparing a lease, takes advantage of his tenant's ignorance and confidence in him, and omits a provision authorizing the tenant to remove improvements placed on the premises by him, equity will reform the instrument. *Daly v. Simonson*, 716.

Right of tenant to improvements. Where improvements were placed on land by a tenant under a lease authorizing him to remove the same, the tenant did not lose his right thereto by taking a lease from a subsequent purchaser while in possession, which failed to reserve the same. *Daly v. Simonson*, 716.

LARCENY.

Misapplication of funds: Criminal liability of officer. An officer of a corporation transacting a lawful business is not guilty of larceny under Code, section 4842, for the act of his subordinates in making a misapplication of funds paid to the corporation by a customer, where the same is not done with his knowledge or under his direction, and from which he receives no personal benefit. *State v. Carmean*, 291.

LAWS. See STATUTES.

LEASES.

Mines and mining: Coal lease: Duty of lessee. Where a lessee contracts to operate a coal mine in a workman-like manner and to pay the lessor a royalty on the coal mined, there is an implied covenant to work the mine with reasonable diligence. *Price v. Black*, 304.

Forfeiture: Abandonment: Evidence. In an action to declare a forfeiture of a coal mining lease on the ground of abandonment, the evidence is reviewed and held to sustain the finding of the trial court that the failure to continuously operate the mine, under the circumstances shown, was insufficient to authorize a forfeiture. *Idem*.

Right of tenant to improvements. Where improvements were placed on land by a tenant under a lease authorizing him to remove the same, the tenant did not lose his right thereto by taking a lease from a subsequent purchaser while in possession, which failed to reserve the same. *Daly v. Simonson*, 716.

LEGISLATIVE ACTS. See STATUTES.

LIBEL.

Notice of delinquent taxes. A notice to a taxpayer pursuant to Code, sections 1374 and 1385, relative to the assessment of

LIBEL Continued

TO

LIMITATION OF ACTIONS

omitted property, is not libelous in the absence of any charge of fraud on the part of the taxpayer withholding the same. *O'Connell v. Shontz*, 709.

LICENSE.

Railroads: Trespassers. Where the employ  s of a packing house company have for years, with the knowledge of the railway company, been accustomed to cross its switch tracks in passing from one building to another about their work, and the railway company has offered no objection or obstruction to such use, it will be held to have consented thereto, and one of such employ  s killed while so crossing its tracks was not a trespasser but a licensee. *Booth v. Railway Co.*, 8.

LIENS.

Corporate stock: Notice. A corporation may create a lien on the stock of any holder thereof, to secure the amount of his liability to the corporation, by a provision to that effect in its articles of incorporation; and the lien so created will be valid as against third persons, though without actual notice thereof. *Dempster Manufacturing Co. v. Downs*, 80.

Lien for damages. Where plaintiff and his grantor exchanged lands, and there was a breach of warranty as to the crops under the covenants in the grantor's deed, plaintiff was entitled to a lien for his damages on the land conveyed to the grantor. *Newburn v. Lucas*, 85.

Mechanic's liens: Essentials: Furnishing material. For a materialman to avail himself of the subcontractor's lien, he must have actually furnished the material for the particular building upon which the lien is claimed, independent of representations of the contractor; but it is not essential that the materials furnished were actually used in the building. *Hobson Bros. v. Townsend*, 453.

Vendor's lien. A grantor claiming that his conveyance was voluntary and without any agreement with the grantee, cannot have a vendor's lien for the price. *Ostenson v. Severson*, 197.

LIMITATION OF ACTIONS.

Amendment of statute. The legislature may amend an existing statute so as to lengthen or shorten the time within which a cause of action on a judgment will be barred, without violating the constitutional prohibition against the impairment of contracts, if a reasonable time is given for the commencement of

LIMITATION OF ACTIONS Continued

action before the bar becomes effectual. *Wooster v. Bateman*, 552.

When statute commences to run. Where a railway company has perfected its title to land under a grant and nothing remains but to receive a certificate from the government, the statute of limitations will commence to run in favor of one claiming an adverse interest at the date such title was perfected, but in the absence of evidence to the contrary, the company will be presumed to have acquired title on the date of the certificate, and the statute will run from that time. *Iowa Railroad Land Co. v. Fehring*, 1.

Bankruptcy. The amendment of 1903, by which the four months' clause of the bankruptcy act is made to count from the date of the recording of the instrument rather than its execution and delivery, is not retroactive, nor does it affect previous constructions of the statute, but limits the time within which proceedings may be instituted. *Murphy v. Murphy*, 57.

Under the bankruptcy law of 1898, it is the transfer of the property which is made an act of bankruptcy and not the recording of the instrument; and the four months within which a preference may be avoided by the trustee commences to run at the time the transfer was made. *Idem*.

Commencement of actions: Reasonable time. In determining whether the time allowed by a statute shortening the period of limitation for the commencement of action to enforce a right is reasonable, the time intervening between the passage of an amendment and the date it takes effect should be considered. In the instant case fifteen months so allowed in which actions might be brought on judgments otherwise barred by the amendment, is held reasonable. *Wooster v. Bateman*, 552.

Husband and wife. The statute of limitations will run against a debt due from a husband to his wife the same as in other cases. In *re Estate of Deaner*, 701.

Infants. The statute of limitations will not run against an infant, except for a forfeiture or penalty, until one year after majority. *Rice v. Bolton*, 654.

Judgments. By Code, sections 3439 and 3447, the time during which an action may be maintained on a judgment rendered in a court of record, is limited to the five years intervening between the expiration of fifteen years from its rendition and the twenty years therefrom when the same is barred. *Wooster v. Bateman*, 552.

LIMITATION OF ACTIONS Continued TO MARKET VALUE

Pleading. Limitation is an affirmative defense and must be pleaded by allegation of facts constituting the same, otherwise it is waived. *Borghart v. Cedar Rapids*, 313.

Sewerage indebtedness. An action against a city on an implied contract to pay the cost of sewerage must be brought within five years from the date at which the cause of action accrued, in the absence of such facts as operate to toll the statute. *Citizens' Bank of Des Moines v. City of Spencer*, 101.

The agreement of a city to pay the costs of sewerage from its own funds, where such action would raise the city's indebtedness beyond the constitutional limit, is invalid. *Idem*.

Taxation: Omitted property: Notice of assessment. Notice to a taxpayer of the proposed assessment of omitted property must be given within five years from the date at which the same should have been assessed, or the same will be barred by the statute. *Schoonover v. Petcina*, 261.

Taxation. The county treasurer need not list omitted property for taxation on the day specified in the notice to the taxpayer to appear and show cause why the same should not be listed and taxed, but may do so within a reasonable time thereafter. *Snakenberg v. Stein*, 650.

MARKET VALUE.

Evidence. In an action to recover the market value of cattle sold for breeding purposes which were tendered under the contract and refused, the defendant should be permitted to show the price at which plaintiff sold the same within a short time of the tender, as bearing on the question of their market value. *Redhead Bros. v. Cattle Co.*, 410.

Where the vendor of cattle for breeding purposes, after tender and refusal, elects to retain the same and claims as damages the difference between the contract price and the market value at the time and place of delivery named in the contract, the value of the cattle for beef was not the proper measure of damages, although their delivery was fixed at a time when there was little sale for breeding purposes, but the jury should have been permitted to consider the fact that the season would soon reopen and to look to sales of similar property within a reasonable time of the delivery together with the cost of keeping the animals, in determining their market value. *Idem*.

MASTER AND SERVANT

MASTER AND SERVANT.

Assumption of risk. Where the unsafety of the place to work provided by the master can be discovered through a casual inspection by the servant, he is presumed to have a knowledge thereof and assumes the risk incident thereto. Under the evidence, it is held that a mine employé assumed the risk arising from an unballasted track. *Flockhart v. Coal Co.*, 576.

A servant does not assume the risk arising from the negligence of the master in employing an incompetent fellow workman. *Scott v. Telephone Co.*, 524.

A workman, under the direction of the owner of a building, engaged in lowering the same onto supports constructed by others, does not assume the risk incident to the defective condition of the supports of which the owner should have known. *Nugent v. Packing Co.*, 517.

Employment of help: Authority of agent. Where the authority of the manager of a grain business to employ help is not expressly limited and there is a proven custom to employ solicitors for a year or longer, it will be presumed in the absence of a contrary showing that the authority was conferred in conformity with the custom; and an employé given a contract for a year will be protected when entered into in good faith and with reasonable prudence. *Roupke v. Grain Co.*, 632.

Evidence: Agent's declarations. In a personal injury action, the statements of an agent of the defendant relating to the accident, not made while engaged in the performance of some duty pertaining to the matter to which the statements relate, and which involve a conclusion that the plaintiff was not guilty of negligence, were inadmissible in proving plaintiff's case and are held prejudicial, although under the record the same were competent on rebuttal. *Ahlquist v. Iron Works*, 67.

Inconsistent claims of servants. The statement of a servant made out of court should be wholly inconsistent with his claim for compensation for the balance of his term after a claimed wrongful discharge, to require an instruction on the question of his having voluntarily left the employment. *Roupke v. Grain Co.*, 632.

Instructions: Negligence. Where an employer was liable for an injury to a workman resulting from failure to provide a proper support onto which plaintiff was lowering a building, reference in the court's instructions to a failure to provide a

MASTER AND SERVANT Continued

TO

MECHANICS' LIEN

safe place to work, which was explanatory of defendant's duty, was not misleading. *Nugent v. Packing Co.*, 517.

In an action for injuries to an employé working at a machine as helper, a charge that if the employer failed to use ordinary care in keeping the machine in repair, but at the time of the accident it was in a defective condition and the defect was known or on the exercise of ordinary care would have been known to the employer, then on so finding the employer was guilty of negligence, and unless they so found the verdict must be for the defendant, was not erroneous as assuming that the machine was in a defective condition. *Fries v. Axle Co.*, 138.

Negligence: Incompetency of fellow servant: Liability of master. An employer in dealing with highly charged electric wires, is held to great care in protecting his servants from injury therefrom, and is not excused from responsibility for the death of a servant caused by the negligence of an inexperienced fellow servant to whom he had intrusted the work of repairing a defective live wire, by the mere fact that he did not know of such servant's incompetency. *Scott v. Telephone Co.*, 524.

Negligence of master: Evidence. Where plaintiff, engaged in repairing in part defendant's building, was injured in following the negligent instruction of defendant's superintendent to lower the same onto a defective brick pier constructed by other workmen, the defendant was liable for the injury in the absence of contributory negligence or assumption of risk. Evidence held to show negligence on the part of the superintendent in directing the work. *Nugent v. Packing Co.*, 517.

Contributory negligence. A carpenter is not presumed to have a knowledge of the sufficiency of a brick pier to support a building onto which he is lowering the same, and is not guilty of contributory negligence in performing the work under the direction of the superintendent of the owner of the building, who assumes to know and asserts its sufficiency. *Idem.*

MECHANICS' LIEN.

Essentials: Furnishing material. For a materialman to avail himself of the subcontractor's lien, he must have actually furnished the material for the particular building upon which the lien is claimed, independent of representations of the contractor; but it is not essential that the materials furnished were actually used in the building. *Hobson Bros. v. Townsend*, 453.

MINES AND MINING

TO

MORTGAGES

MINES AND MINING.

Coal lease. Duty of lessee. Where a lessee contracts to operate a coal mine in a workman-like manner and to pay the lessor a royalty on the coal mined, there is an implied covenant to work the mine with reasonable diligence. *Price v. Black*, 304.

Forfeiture: Abandonment: Evidence. In an action to declare a forfeiture of a coal mining lease on the ground of abandonment, the evidence is reviewed and held to sustain the finding of the trial court that the failure to continuously operate the mine, under the circumstances shown, was insufficient to authorize a forfeiture. *Idem*.

MINORS.

Divorce: Support of child. A husband is obligated to provide for his child given into the custody of his divorced wife, but no cause of action therefor arises until he has refused to respond to a just claim on him for the child's maintenance. *Foote v. De Poy*, 366.

Infant claimants: Equitable relief. The mere fact of infancy will not authorize a court of equity to set aside an order discharging an administrator, to permit the filing of a claim against the estate which is barred by the statute. *Boyle v. Boyle*, 167.

Limitation of actions. The statute of limitations will not run against an infant, except for a forfeiture or penalty, until one year after majority. *Rice v. Bolton*, 654.

MISCONDUCT.

Argument. Where misconduct in argument is not so flagrant that it could not have been prevented or its resulting prejudice removed by an instruction, the cause will not be reversed on appeal on account thereof, no objection thereto having been raised in the trial court. *Gregory v. Railway Co.*, 230.

Misconduct of juror. Proof that jurymen, while deliberating upon the case, stated their personal knowledge of facts relevant to the issues, and that outsiders discussed the case in the presence of members of the jury in such a manner as to create prejudice, will authorize a new trial. *Hydinger v. Railway Co.*, 222.

MORTGAGES.

Bankruptcy: Rights of creditors. The provision of the bankruptcy act that "claims, which for want of record or other

MORTGAGES Continued

reasons would not have been valid liens against creditors of the bankrupt, shall not be liens against his estate," refers to the validity of liens under the State law; and a creditor existing when a mortgage is executed must have acquired a lien on the mortgaged property, by attachment or otherwise, prior to notice of the mortgage to entitle him to question its validity; but a subsequent creditor may attack it on the ground that he was fraudulently induced to extend credit. *Murphy v. Murphy*, 57.

Building and loan mortgages: Foreclosure: Computation: Judgment. In construing Code, section 1898, relative to the foreclosure of a building and loan association mortgage, it is held that in computing the sum for which judgment should be entered, the borrower should be charged with the net amount of the loan received by him, together with twelve per cent. interest per annum thereon, and he should be credited with the full amount paid by him as dues, fees, fines, premiums, and interest, and judgment should be rendered for the difference, if any; but if the payments exceed the net amount of the loan and interest then the association is not entitled to judgment. *Weaver, J., dissenting. Iowa Deposit & Loan Co. v. Matthews*, 743.

Chattel mortgages: Description of property. A description in a chattel mortgage as "one bay horse twelve years old named Mike, one bay mare, white strip in forehead, named Mollie, twelve years old," the mortgage also stating from whom purchased, the residence of the mortgagors and that the property was in their possession there to remain until default in payment or an attempted sale, was sufficiently definite to authorize its admission in evidence. *Colean Implement Co. v. Strong*, 598.

Defective title: Notice to mortgagee. Neither the fact that a mortgagor's title was based on a deed from her husband expressing a consideration of "love and affection" nor that a judgment was entered against the husband shortly after the conveyance, amounted to notice to the mortgagee of a defective title. *Glassburn v. Wireman*, 478.

Redemption from mortgage foreclosure: Equity: Accounting. A mortgagor whose property has been sold on foreclosure or his assignee may maintain an equitable action to redeem if brought prior to the expiration of the statutory period of redemption, and where possession has been taken by the holder of the certificate of sale without assent he may have an ac-

MORTGAGES Continued

TO

MUNICIPAL CORPORATIONS

counting of the rents and profits and of any portion of the property converted by the certificate holder to his own use, for the purpose of ascertaining the amount required to make redemption. *Dolan v. Blast Furnace Co.*, 254.

Recovery of rents and profits by junior mortgagee. A junior mortgagee or his assignee, whose rights have not been foreclosed, may redeem from the foreclosure of a prior mortgage and recover the rents and profits less permanent improvements if any, but such rents must be determined and recovered in the action for redemption and not by a separate suit, unless a sufficient excuse for the failure be shown. *Meredith v. Lochrie*, 596.

MOTIONS. See PLEADINGS — PRACTICE.

MULCT TAX.

Compensation of county treasurer. That portion of the regular annual mulct tax which a county is required by law to pay to a city, is not subject to the county treasurer's charge of three-fourths of one per cent. for collection, as provided in Code, section 490, but any additional tax imposed by the city for its benefit and collected by the treasurer should pay this commission. *City of Waverly v. Bremer County*, 98.

Liability of sureties. The sureties on a saloon keeper's bond are liable for the payment of the mulct tax. *O'Brien County v. Mahon*, 539.

A county may recover from the sureties on a liquor dealer's bond without first exhausting the property of the principal. *Idem.*

Recovery of mulct tax. The county may recover the entire mulct tax, though one-half is to go to the municipality. *Idem.*

MUNICIPAL CORPORATIONS. See SIDEWALKS — STREETS. CITIES AND TOWNS.

Contagious disease: Employment of physician. A board of health of a special charter city may, in an emergency, legally contract with a member of the city council and also the health officer of the city to attend persons who are a county charge afflicted with a contagious disease. *Dewitt v. Mills County*, 169.

Estoppel. The payment of an installment of a void assessment by one under whom plaintiff claims title, will not estop him from contesting the validity of the tax; nor will the fact that plaintiff's remote grantor took title "subject to all incum-

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branches of record" operate as an estoppel against him. *Carter v. Cemansky*, 506.

Limitation of action. An action against a city on an implied contract to pay the cost of sewerage must be brought within five years from the date at which the cause of action accrued, in the absence of such facts as operate to toll the statute. *Citizens' Bank of Des Moines v. City of Spencer*, 101.

Limitation of indebtedness. The agreement of a city to pay the costs of sewerage from its own funds, where such action would raise the city's indebtedness beyond the constitutional limit, is invalid. *Idem*.

Municipal Improvement Contracts. The provisions of a paving contract requiring the contractor to pay all damage arising from the work; to leave all permanent streets, walks and alleys in as good condition as when found; to indemnify the city against claims arising from injury to person or property on account of the work; to pay all injury to water, gas and sewer pipes; and to keep the pavement in repair for one year, do not invalidate the contract. *Diver v. Savings Bank*, 691.

The provisions of a paving contract limiting the contractor's right in the employment of help and purchase of material are invalid, but a property owner who made no objection to the same until after the work was done and the benefit accrued cannot complain thereof, where it affirmatively appears that the cost of the work was not thereby increased. *Idem*.

After a municipal improvement has been made and accepted by the city, a taxpayer, in the absence of actual fraud, cannot resist payment therefor because of a violation of Code, section 943, prohibiting a member of the council from being interested in any contract for such work. *Idem*.

Negligence. A city is liable for an injury resulting from the negligent maintenance of a private cellarway which extends into a traveled street, whether the injury results from an approach from the street or the abutting property. *Earl v. Cedar Rapids*, 361.

Where plaintiff contended that she did not know of the defect in the walk until after the accident, her belief that she could safely pass over the same was immaterial. *Keim v. Fort Dodge*, 27.

Where it appeared that the city had undertaken to light its streets, but that no light was located at the corner where the accident occurred, and the evidence was conflicting as to

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whether the lights were burning at the time of the injury, it was competent for plaintiff to show that the lamps were burning and did not give sufficient light at the place of accident to disclose the defective character of the walk. *Idem*.

In an action for injury at night from an alleged gutter apron, evidence that the apron was the same as those which were and for a long time prior had been in general use in the city, was admissible as bearing upon plaintiff's knowledge of the same, it appearing that she had been a resident of the city for several years and had used the walks as pedestrians usually do. *Idem*.

Ordinances. A city has power under Code, section 680, to enact an ordinance prohibiting the keeping of a place of business, resorted to for the purpose of drinking intoxicating liquor, open on Sunday. *Town of Lovilia v. Cobb*, 557.

Generally the authority providing for an exercise of a power granted to a city by the legislature should be by ordinance rather than by resolution, but where the council is required by the statute or a general ordinance to act simply by a vote or otherwise, a resolution is sufficient. *Martin v. Oskaloosa*, 680.

Although the statutes may not specifically require an ordinance for the exercise of a delegated power, yet if the statute is not specific as to the method, an ordinance may be necessary, and when enacted must be pursued. *Idem*.

An ordinance prohibiting the keeping of a place, resorted to for the purpose of drinking liquors, open on Sunday, is comprehended in a title "an ordinance concerning misdemeanors." *Town of Lovilia v. Cobb*, 557.

Where the statute requires an ordinance for the exercise of a power conferred upon a city, the proceedings of the city without the ordinance are void. *Martin v. Oskaloosa*, 680.

Recovery of public funds. A citizen and taxpayer cannot maintain a suit to recover funds of a city alleged to have been misappropriated, without first demanding of the proper officers that suit be brought, or a showing that such demand would have been unavailing. *Reed v. Cunningham*, 302.

Sewerage. One dealing with a municipal corporation is bound to take notice of the statutory limitations upon its power, and the unauthorized act of a city council in contracting for sewerage will not estop the city from denying liability therefor, notwithstanding the implied representations of authority

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so to do; nor is a *quantum meruit* recovery in such cases authorized. *Citizens' Bank of Des Moines v. City of Spencer*, 101.

In the absence of a valid ordinance or resolution directing the construction of sewerage, a city council can not make a valid municipal obligation with respect thereto. *Idem*.

After a sewerage assessment has been declared invalid and a legislative act intended to cure the assessment has been passed, the city should be given an opportunity to make a reassessment before suit is brought against it on an implied contract to pay for the sewerage. *The Citizens' Bank of Des Moines v. City of Spencer*, 101.

Of special assessments. Where the published notice of a street improvement does not correspond with the ordinance and resolution, or the notice for proposals for bids does not cover the existing situation, an assessment of abutting property for the cost is void. *Gallaher v. Garland*, 206.

A property owner who has no knowledge that the cost of grading a street is to be assessed against his property does not waive objection thereto by failing to protest as the work goes on. *Idem*.

Where an assessment is void, failure to object to the proceeding before the city council will not preclude a suit to restrain collection thereof. *Idem*.

Where a city has authority only to gravel a street at the expense of abutting property, and in connection therewith incurs and assesses against the property an expense for grading, which is unnecessary for the purpose of graveling and there is no way of separating such expense, the assessment is void *in toto*. *Idem*.

Where an ordinance authorizing an assessment of abutting property to pay street improvements is wholly void, and no valid reassessment thus ordered can be made, a subsequent ordinance providing a legal method will not sustain the prior proceedings. *Martin v. Oskaloosa*, 680.

Where a statute conferring upon a city the power to make special assessments for improvement purposes points out the method to be pursued, the adoption of an ordinance for that purpose is not necessary. Under this rule a city had power to assess the cost of street improvements to abutting property pursuant to statutory provisions substantially as contained in chapter seven, title five, of the Code, and the validity

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- of the ordinance under which it purported to act was immaterial except so far as inconsistent with the statute. *Idem*.
- Where a municipal assessment is void, the plaintiff in an action to quiet title against a tax sale thereunder is not required, as a condition precedent to his right of action, to offer to pay that part of the tax which may be found valid; it will be sufficient if this is done when a right is asserted under the certificate of sale. *Carter v. Cemansky*, 506.
- A property owner is not required to appear before the city council and object to a municipal assessment for an unauthorized improvement in order that he may contest the validity of an alleged tax based thereon. *Idem*.
- Where a municipal assessment for grading a street is wholly void, the property owner is not liable for benefits conferred; nor will delay in suing to quiet title against the assessment constitute a defense to that action. *Idem*.
- Where a city had authority to levy a special assessment, it may make a reassessment because of an irregularity, under Code, section 836. *Martin v. Oskaloosa*, 680.
- Special charter city assessments.** The repeal of a statute by implication is not favored in law, and where two statutes covering in whole or in part the same subject are not absolutely irreconcilable and a purpose of repeal is not clearly expressed or indicated, effect if possible will be given to both. Under this rule, Code, section 971, relative to notices in cases of special assessments is not repealed and section 823 substituted therefor by chapter 29, Acts Twenty-eighth General Assembly, but the former is applicable to cities under special charter, and the latter to cities organized under the general law. *Diver v. Savings Bank*, 691.
- Sidewalks.** The owner of a building and his tenants who maintain a cellarway from a traveled street to the basement, which extends into the street, and who leave the trap door thereto open without railing or guard, are negligent; and the liability of the city for an injury therefrom is a question of fact dependent upon all the circumstances. In the instant case all defendants were properly found to be negligent. *Earl v. Cedar Rapids*, 361.
- Where the uncontradicted testimony of a pedestrian was that he did not know of an excavation in the street until he fell into it, he was not guilty of contributory negligence in imprudently attempting to pass over it, although there was an-

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other safe and convenient way. *Bussell v. City of Fort Dodge*, 308.

Streets. In an action against a city for injuries to a pedestrian caused by an excavation in the street, the evidence as to plaintiff's contributory negligence is reviewed and held to present a question of fact for the jury, whose finding will not be disturbed. *Idem*.

A town is liable for the injury to a horse, though running at large, caused by a defective street negligently permitted to remain out of repair. *Nocks v. Town of Whiting*, 405.

Where a railroad embankment obstructs a street affording access to business property which has not been vacated, the owner is entitled to damages for depreciation in the value of his property caused thereby. *Harrington v. Railway Co.*, 388.

Vacation of streets. Under Code, section 751, the vacation of a street by a city does not revert the title thereto in the abutting owner, but it remains in the city and may be disposed of for other purposes. *Idem*.

The provisions of an ordinance intended to vacate portions of certain streets are construed and held sufficient to effect that purpose, although providing that upon abandonment by the company, the title shall revert in the city. *Idem*.

Vacation of public ground: Damage to abutting owner. A city has power to vacate public grounds, and where all property owners are affected alike by its exercise, though in different degrees, there is no remedy; but where an abutting owner sustains an injury peculiar to his property by the vacation of public grounds used as an ingress and egress thereto he is entitled to damages. *Borghart v. Cedar Rapids*, 313.

COUNTIES.

Construction of bridges: Fraud: Evidence. Where a bridge contractor materially alters the plans and specifications for the construction of county bridges by reducing the amount of material therein, without the knowledge or consent of the county or its agents authorized to consent to the change, it amounts to a fraud for which the county may recover. *Modern Steel Structural Co. v. Van Buren County*, 606.

Contract with county: Fraud. A contract for improvement of a highway made through an arrangement with and for the benefit of a member of the board of supervisors, is fraudulent and void. *Nelson v. Harrison County*, 436.

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Any contract entered into by a board of supervisors to furnish the county supplies, materials, or labor, which is with or for the benefit of any member of the board, is void to the extent of such member's interest therein. Evidence held to show the contract in suit void as to the interest of a supervisor therein. *Idem.*

Contagious disease: Compensation of physician: Liability of county. Under section 2570, Code of 1897, the liability of a county became absolute for the bill of a physician employed by a local board of health to attend a person afflicted with contagious disease, as the same was allowed by the board of health, where it appeared that the patient and those liable for his support were unable to pay. *Resner v. Carroll County*, 423.

A board of supervisors had no authority under Code of 1897 to reduce the bill of a physician for attending a smallpox patient, where the same had been audited and allowed by the board of health, and the acceptance of a portion of the sum did not bar a claim for the balance, in the absence of agreement. *Idem.*

Estoppel. The acceptance of a county bridge in ignorance of the fact that the same was not constructed in accordance with the contract, will not estop the county from insisting upon a breach of the contract or a recovery of damages. *Modern Steel Structural Co. v. Van Buren County*, 606.

The execution and delivery to a bridge contractor of a written acceptance of the work by individual members of the board of supervisors, made at an informal gathering for the purpose of examining the work to enable them to act intelligibly upon the matter of accepting the same, was not an act of the county; and it was not estopped thereby from relying on a breach of the contract in the construction of the bridge. *Idem.*

The public use of a bridge will not amount to an acceptance thereof and estop the county from insisting upon a breach of the contract for its construction. *Idem.*

Partial payments by a county auditor on a contract on the order of a single member of the board of supervisors and without knowledge of the contractor's default in construction, will not estop the county from asserting its claim for damages based on the contractor's breach of the contract. *Idem.*

Where a county, after notice of its unsafe condition, in under-

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taking to repair a bridge and put it in condition for public travel fails to use reasonable care in the work, it is negligent; and an inspection of the same after its repair by agents of the county who report it safe for ordinary travel, will not relieve the county from liability for the consequences of such negligence. *Schlensig v. Monona County*, 625.

No act of an engineer appointed by the county to supervise the construction of bridges, nor of an individual member of the board of supervisors by which a contractor was permitted to erect less valuable structures than provided by the contract, will estop the county from claiming damages for the default as against the contractor or any one claiming under him. *Modern Steel Structural Co. v. Van Buren County*, 606.

A county cannot be estopped by the acts of its representative appointed to look after the construction of bridges, who, through collusion with the contractors, perpetrates a fraud on the county by the substitution of materials inferior to that called for by the contract. *Idem*.

Mulct tax: Compensation of county treasurer. That portion of the regular annual mulct tax which a county is required by law to pay to a city, is not subject to the county treasurer's charge of three-fourths of one per cent. for collection, as provided in Code, section 490, but any additional tax imposed by the city for its benefit and collected by the treasurer should pay this commission. *City of Waverly v. Bremer County*, 98.

Subcontractor's claims: Liability of county. Where a county has not reserved the right to pay the claim against a contractor employed to construct bridges, and a subcontractor has failed to file the statement of his demand as provided by Code, section 3102, the county may rightfully pay the contractor according to the terms of the contract, without inquiring as to materials furnished by subcontractors. *Modern Steel Structural Co. v. Van Buren County*, 606.

A subcontractor who furnishes material for the construction of county bridges under an agreement with the principal contractor alone, is charged with notice of the terms and conditions of the principal contract, and his rights are limited thereby; and where the county has lawfully discharged its obligation to the contractor prior to notice of the subcontractor's claim, or where the contract is void for fraud, the subcontractor has no recourse against the county. *Idem*.

Where a county contracted separately for the construction of

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two bridges and was sued by a subcontractor who furnished material for both under a single agreement with the contractor and who made but a single statement for the materials furnished and was seeking to enforce its entire claim against the county for an alleged unpaid balance for either or both bridges, the county could offset its entire damages for a breach of both contracts in determining whether there was anything in its hands applicable to the subcontractor's demand. *Idem.*

Surface water: Diversion. A county in the improvement of highways has no right to collect surface water either from the highway or from adjoining lands and turn it onto the land of another where it had not naturally flown. *Schofield v. Cooper*, 334.

Supervisors. Under the statutes, the management and control of county property is entrusted to the board of supervisors, and unless its acts are, in bad faith and amount to a fraud upon the county the courts will not interfere. *Nelson v. Harrison County*, 436.

Swamp lands: Use of proceeds: Statutes. A county may use the proceeds arising from the sale of swamp lands granted to it by the swamp land act of 1850, in the construction of roads through the swamp land district, without submitting the question to a vote of the people, notwithstanding the subsequent act of 1858 which is held to require such submission in case roads are to be constructed outside the swamp land district. *Idem.*

Warrants: Illegal issue. Warrants issued in payment of material greatly in excess of the county's need, and at exorbitant prices, and under circumstances indicating collusion and fraud, should be cancelled by the court or reduced to the proper amount, though held by a third party. *Idem.*

A contract prohibited by statute is void, and where county warrants in whole or in part are issued to members of a board of supervisors on either an express or implied contract to furnish the county materials or labor, the same should be cancelled or reduced by the court to the lawful amount, though in the hands of a third party. *Idem.*

The invalidity of a contract made by a county and the issuance of a warrant thereunder, cannot be determined in a suit between the county and its treasurer to restrain the payment of the warrant, to which the person with whom

the contract was made and warrant issued was not a party.
Idem.

MURDER.

Examination of hostile witness. On a prosecution for murder where the State's witnesses seek to avoid giving testimony tending to convict the defendant, the court may in its discretion permit the State's attorney to treat them as hostile and to cross examine them respecting their testimony before the grand jury. *State v. Robinson*, 69.

Expert evidence: Hypothetical questions. On a prosecution for murder effected by strychnine poisoning, the admission of an answer to a hypothetical question, although based in part upon facts not clearly proven, was not prejudicial where the witness subsequently gave the same answer to a question from which the objectionable matter was eliminated.
Idem.

In a prosecution for murder by strychnine poisoning, it was not prejudicial error to permit a hypothetical question to a chemist, containing a symptom which defendant claimed had not been proven, where the real purport of the question was whether the chemical analysis of the contents of the stomach would reveal strychnine provided death was due to such poisoning. *Idem.*

Murder in first degree: Evidence. On a prosecution for murder based on the felonious administration of strychnine to an infant, the evidence is reviewed and held sufficient to sustain a conviction of murder in the first degree. *Idem.*

Poisoning: Indictment. An indictment for murder effected by means of a felonious administration of poison, need not allege a specific intent to kill. *Idem.*

Self-defense: Instructions. In a prosecution for murder which is admitted but justified on the ground of self-defense, the defendant is entitled to an instruction that the burden is on the State to show that the act was not in self-defense, especially where the tenor of instructions given were calculated to impress the jury with the idea that it was a defense for the defendant to establish. *State v. Usher*, 287.

MUTUAL INSURANCE. See **INSURANCE.**

NEGLECT.

Assumption of Risk. A telephone lineman not an inspector of wires, nor charged with the duty of inspecting or testing

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live wires, does not assume the risk of an injury resulting from a defective light wire. *Barto v. Telephone Co.*, 241.

Assumption of risk. A workman, under the direction of the owner of a building, engaged in lowering the same onto supports constructed by others, does not assume the risk incident to the defective condition of the supports of which the owner should have known. *Nugent v. Packing Co.*, 517.

Where the unsafety of the place to work provided by the master can be discovered through a casual inspection by the servant, he is presumed to have a knowledge thereof and assumes the risk incident thereto. Under the evidence, it is held that a mine employé assumed the risk arising from an unballasted track. *Flockhart v. Coal Co.*, 576.

A servant does not assume the risk arising from the negligence of the master in employing an incompetent fellow workman. *Scott v. Telephone Co.*, 524.

Care. The liability of a railway company for the death of a trespasser upon its tracks, is not dependent upon the willful and wanton act of the trainmen, but a failure to exercise the highest possible degree of care to avoid the accident after the peril is discovered, will fix its liability. *Gregory v. Railway Co.*, 230.

Where a county, after notice of its unsafe condition, in undertaking to repair a bridge and put it in condition for public travel fails to use reasonable care in the work, it is negligent; and an inspection of the same after its repair by agents of the county who report it safe for ordinary travel, will not relieve the county from liability for the consequences of such negligence. *Schlensig v. Monona County*, 625.

Where one relies upon defective sight as an excuse for failing to observe an obstruction upon the sidewalk, from which an injury resulted, the defendant is entitled to an instruction that corresponding caution is exacted, although only ordinary care under all the circumstances is required. *Kaiser v. Hahn Bros.*, 561.

A pedestrian is not required to be on the lookout for hidden dangers in the street. He is only required to walk with his eyes open observing his natural course, and in the usual manner. A finding of ordinary care is sustained. *Earl v. Cedar Rapids*, 361.

Where the court instructed generally that a pedestrian is required to use ordinary care to avoid an accident, a further instruction

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that if plaintiff knew of the defect in the walk or if the street was dimly lighted, she was bound to use "a greater degree of care" than if she had no knowledge of the defect or if the street was well lighted, was misleading. *Keim v. Fort Dodge*, 27.

A railway company is not liable because of a failure of the engineer to sound the whistle when the accident would inevitably have happened, but the question of whether such signal would probably have avoided the accident is for the jury. *Gregory v. Railway Co.*, 230.

Where an engineer discovered a child of tender years upon the track, the question of whether his failure to sound the whistle was the exercise of a prudent judgment, was one of fact for the jury. *Idem*.

The question of negligence in the use of a gasoline engine for the operation of an elevator in near proximity to a traveled highway, resulting in an injury from a frightened team, was, under the evidence in the case, one of fact for the jury. *Wolf v. Elevator Co.*, 659.

Contributory negligence. In an action for injury to cattle at a public railway crossing, the evidence as to plaintiff's contributory negligence is held to present a question of fact for the jury. *Kuehl v. Railway Co.*, 638.

Where the uncontradicted testimony of a pedestrian was that he did not know of an excavation in the street until he fell into it, he was not guilty of contributory negligence in imprudently attempting to pass over it, although there was another safe and convenient way. *Bussell v. City of Fort Dodge*, 308.

A carpenter is not presumed to have a knowledge of the sufficiency of a brick pier to support a building onto which he is lowering the same, and is not guilty of contributory negligence in performing the work under the direction of the superintendent of the owner of the building, who assumes to know and asserts its sufficiency. *Nugent v. Packing Co.*, 517.

Although a pedestrian may not pass along a sidewalk utterly heedless of danger, yet failure to anticipate an unusual danger is not contributory negligence as a matter of law. Under the evidence plaintiff's negligence was properly submitted to the jury. *Kaiser v. Hahn Bros.*, 561.

One is not guilty of contributory negligence as a matter of law in passing over a defective walk rather than taking another

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- way, where the defect was not known to him. *Considine v. City of Dubuque*, 284.
- A telephone lineman was injured by coming in contact with a defectively insulated electric light wire which the defendant carried on its poles; under the evidence it is held that the question of the lineman's contributory negligence was properly submitted to the jury. *Barto v. Telephone Co.*, 241.
- In an action for the death of a packing house employé struck by a passing car while crossing defendant's tracks in going from one building to another, the evidence is reviewed and held that he was not guilty of contributory negligence as a matter of law, in not using a crossing or in failing to look and listen for an approaching car, before going onto the tracks. *Booth v. Railway Co.*, 8.
- Defective streets.** A town is liable for the injury to a horse, though running at large, caused by a defective street negligently permitted to remain out of repair. *Nocks v. Town of Whiting*, 405.
- In an action against a city for injuries to a pedestrian caused by an excavation in the street, the evidence as to plaintiff's contributory negligence is reviewed and held to present a question of fact for the jury, whose finding will not be disturbed. *Bussell v. City of Fort Dodge*, 308.
- The fact that plaintiff's team was not upon a public street when frightened by defendant's negligent use of an engine, did not affect his liability for an injury resulting therefrom, it appearing that plaintiff was not a trespasser but upon a traveled way the use of which defendant had acquiesced in. *Wolf v. Elevator Co.*, 659.
- A city is liable for an injury resulting from the negligent maintenance of a private cellarway which extends into a traveled street, whether the injury results from an approach from the street or the abutting property. *Earl v. Cedar Rapids*, 361.
- The owner of a building and his tenants who maintain a cellarway from a traveled street to the basement, which extends into the street, and who leave the trap door thereto open without railing or guard, are negligent; and the liability of the city for an injury therefrom is a question of fact dependent upon all the circumstances. In the instant case all defendants were properly found to be negligent. *Idem*. evidence of conversations between a train dispatcher and a
evidence. In an action for the death of a railroad contractor,

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telegraph operator with reference to requiring trains to slow down as they approach the work, was inadmissible on the question of the company's negligence, it appearing that the dispatcher was connected with another division of the road and there being no showing of authority or that anyone in authority had knowledge of the work. *Carpenter v. Railway Co.*, 94.

The liability of a railway company for a personal injury is dependent upon a violation of some duty which it owes the plaintiff. The evidence is reviewed and held insufficient to establish negligence, and to support a directed verdict for defendant. *Eakins v. Railway Co.*, 324.

In an action for injuries sustained by the alleged negligent operation of a street car, the offer of city ordinances regulating its operation, which are simply an affirmation of the rules of law, should be rejected. *Christy v. Stedman*, 428.

In an action for injury to a brakeman, the evidence is considered and held insufficient to support a submission on the theory that the engineer was negligent in suddenly stopping his train. *Allen v. Railway Co.*, 213.

The testimony of enginemen as to when they first discovered the peril of a trespasser on the tracks is not conclusive on the subject, but all the circumstances bearing on the question are for the consideration of the jury. *Gregory v. Railway Co.*, 230.

An objection to questions in an action for negligence, that they call for evidence of distinct prior acts of negligence, cannot be urged for the first time on appeal. *Idem*.

In an action for injuries from an abrupt approach from a street crossing to the sidewalk, the evidence of the city's negligence is reviewed and held sufficient to take the case to the jury. *Achey v. City of Marion*, 47.

In an action for injury from an improperly constructed sidewalk, negligence on the part of a city cannot be proven by showing a change in the walk subsequent to the injury, yet if such evidence is competent for other purposes, it will not be discredited because incidentally disclosing such change. *Idem*.

Instructions. Where the court properly charged that the negligence complained of was failure to provide adequate protection against a street excavation and that if the city failed in this respect a finding of negligence was warranted, the further instruction that if plaintiff failed to show that the

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excavation, was "properly" protected he could not recover, was not misleading, as from the whole charge it was apparent the word "improperly" was intended. *Bussell v. City of Fort Dodge*, 308.

Where an action for damage caused by flooding plaintiff's land was submitted on the theory that defendant's negligent construction of its bridge caused the overflow, and the court instructed that unless the same caused the water to flow over plaintiff's land he could not recover, failure to specifically cover the question of whether the flood which did the injury was surface water, was not error. *Vyse v. The Chicago, B. & Q. Ry. Co.*, 90.

Unless the negligent act of a railway company in constructing a bridge was the producing cause in flooding plaintiff's land, it was not liable for the injury. The court's instructions when construed together, are held correct. *Idem*.

Where an employer was liable for an injury to a workman resulting from failure to provide a proper support onto which plaintiff was lowering a building, reference in the court's instructions to a failure to provide a safe place to work, which was explanatory of defendant's duty, was not misleading. *Nugent v. Packing Co.*, 517.

In an action for injuries resulting from collision* with a street car, instructions directing a verdict for defendant if plaintiff failed to show freedom from contributory negligence, and enumerating the acts of negligence relied upon, except failure of the motorman to stop the car after he saw plaintiff's peril, and further charging that if the jury failed to find any of the acts of negligence, their verdict should be for defendant, were inconsistent with another charge that though plaintiff was negligent yet defendant would be liable if its employes saw plaintiff and knew of his peril and failed to use ordinary care to prevent the injury. *Christy v. Stedman*, 428.

Where the only negligence charged was want of care on the part of the engineer in failing to observe an order and in running his train at such speed as to make a sudden stop necessary, and the evidence showed that a sudden stoppage of the train was justified by the emergency, an instruction that for plaintiff to recover he must establish by a preponderance of evidence that while in the discharge of his duties as brakeman he was thrown from the train and injured, without fault on his part, by the negligence of the engineer in making

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a violent stoppage of the train, was error. *Allen v. Railway Co.*, 213.

In determining the question of an engineer's negligence in failing to sound the whistle after discovering a child upon the track, an instruction that the jury might consider, among other things, whether an alarm would have frightened the child, and if so, whether the result would have been to cause it to remain on the track or move off, was properly given. *Gregory v. Railway Co.*, 230.

Where the negligence charged was the improper construction of a sidewalk and the evidence tended to support the allegation, it was not error to refuse an instruction relating to negligence in failing to repair. *Achey v. City of Marion*, 47.

In an action for injuries to an employé working at a machine as helper, a charge that if the employer failed to use ordinary care in keeping the machine in repair, but at the time of the accident it was in a defective condition and the defect was known or on the exercise of ordinary care would have been known to the employer, then on so finding the employer was guilty of negligence, and unless they so found the verdict must be for the defendant, was not erroneous as assuming that the machine was in a defective condition. *Fries v. Axle Co.*, 138.

Intervening negligence. Negligence on the part of the purchaser of poison will not necessarily excuse the vendor for his violation of the law requiring it to be labeled. *Burk v. Creamery Package Mfg. Co.*, 730.

Master and servant. Where plaintiff, engaged in repairing in part defendant's building, was injured in following the negligent instruction of defendant's superintendent to lower the same onto a defective brick pier constructed by other workmen, the defendant was liable for the injury in the absence of contributory negligence or assumption of risk. Evidence held to show negligence on the part of the superintendent in directing the work. *Nugent v. Packing Co.*, 517.

In an action for the death of an employé of a telephone company caused by his coming in contact with a wire charged with electricity, through the negligence of a fellow servant sent to repair the wire, the evidence is reviewed and held to sustain a finding that the fellow servant was incompetent and that defendant had knowledge thereof. *Scott v. Telephone Co.*, 524.

An employer in dealing with highly charged electric wires, is held to great care in protecting his servants from injury

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therefrom, and is not excused from responsibility for the death of a servant caused by the negligence of an inexperienced fellow servant to whom he had intrusted the work of repairing a defective live wire, by the mere fact that he did not know of such servant's incompetency. *Idem*.

Physicians: Negligent treatment. Negligence in permitting certain intervals to elapse between a physician's visits depends on the custom or practice in similar localities, and not on the custom of a particular physician in his own practice. *Tomer v. Aiken*, 114.

In an action for damages resulting from an alleged negligent treatment of an injury to plaintiff's shoulder bones, the question of whether the injury was diagnosed as a dislocation or as a fracture, was, under the conflicting evidence, one for the jury. *Idem*.

The fact that a physician improperly diagnosed an injury as a fracture rather than as a dislocation was immaterial on the question of negligent treatment, where the treatment was suitable to reduce a dislocation. *Idem*.

Where the employment of a physician has been terminated, he may refuse further attendance, and such refusal, where there is no further showing save the patient was suffering the pain usual in such cases, will not justify the admission of evidence that the same amounted to improper treatment; nor under the circumstances was negligence of the attending physician shown. *Idem*.

Negligence of a physician cannot be predicated on a failure to effect a cure of a dislocated shoulder bone, where it is shown that favorable results are not always obtained under any form of treatment. *Idem*.

In an action for the negligent treatment of a dislocated shoulder, the evidence is reviewed, and in view of the conflict, is held to present a question for the jury as to whether the method of treatment adopted was proper. *Idem*.

Poisoning. Where a jug of poison was deposited in a creamery at a place where similar receptacles were usually kept containing buttermilk, permission of the creamery manager to take a drink of buttermilk was not of itself negligence, it not appearing that he knew one of the jugs to contain poison. *Burk v. Creamery Package Mfg. Co.*, 730

Proximate cause. In an action for negligence, it is not error for the court to use the term "proximate cause" in an instruction, without defining it. *Burk v. Creamery Package Mfg. Co.*, 730.

NEGLECTANCE Continued

Where several proximate causes contribute to an accident, and each is an effective cause, the result may be attributed to any or all of the causes. *Idem*.

In an action for the death of plaintiff's son caused from drinking a poisonous liquid sold by defendant without labeling as required by law, it was incumbent on plaintiff to show that such violation of the statute was the proximate cause of the death. *Idem*.

Whether the negligent failure of a railway company to sound the engine whistle as the train approached a public crossing was the proximate cause of the injury to cattle being driven over the crossing, was a question of fact for the jury. *Kuehl v. Railway Co.*, 638.

Where one was fully advised and knew of the impending danger from an approaching train, and death resulted from his failure to avoid the accident, negligence of the company could not be predicated on the failure of the engine men to ring the bell or sound the whistle, it appearing that the duty to so warn the deceased did not arise until after he knew of the danger; nor was such failure the proximate cause of the injury. *Carpenter v. The Chicago, R. I. & P. Ry. Co.*, 94.

Where plaintiff was injured from a fall due to an alleged defective sidewalk and subsequently sustained other injuries from a fall on another street, due to the negligence of the city in failing to keep the walk clear of snow and ice, it is held that the relation of the alleged negligence of the city causing the first injury to the latter accident, was not such as to constitute the former the natural and proximate cause of the latter. *Watters v. Waterloo*, 199.

Pleadings. Where an action was bottomed on negligence and the wrong was willful, the petition need not negative contributory negligence. *Continental Ins. Co. v. Clark & Cressler*, 274.

In an action for negligence against a railway company, an allegation of the petition that defendant obstructed a street by its cars, should be stricken, where it was not also alleged that the street extended over the right-of-way. *Eakins v. Railway Co.*, 324.

Under Code, section 1743, the failure of an insured to keep a set of books, or the violation of an iron safe clause, will not defeat recovery where there is neither pleading nor proof that such neglect contributed to the loss. *Johnson v. Insurance Co.*, 565.

It is not necessary that one should foresee the consequences of

NEGLIGENCE Continued

TO

NEW TRIAL

a wrongful act to be liable for an injury resulting therefrom. *Burk v. Creamery Package Mfg. Co.*, 730.

Sale of poison. The sale of poisonous substances without labeling the same as required by law, is negligence *per se*. *Idem*.

Telephones: Electricity. A telephone company which acquiesces in the use of its poles by an electric company, is charged with the duty of seeing to it that the light wires do not expose its employes to unusual danger. *Barto v. Telephone Co.*, 241.

A telephone company permitting the use of its poles for carrying electric light wires, must use a degree of care for the protection of its employes commensurate with the danger involved. *Idem*.

In an action by a telephone lineman for injuries caused by a defective electric light wire carried on the poles of the telephone company, the evidence is reviewed and held to justify a submission to the jury of the issue of defendant's negligence. *Idem*.

NEGOTIABLE INSTRUMENTS. See **BILLS AND NOTES**.

NEW TRIAL.

Application. An application for a new trial based on a supposed agreement with counsel, which fails to allege that the agreement was not performed, is insufficient. *Tschohl v. Insurance Co.*, 211.

Defense. An application for a new trial after judgment by default must set forth a good defense to the action. *Idem*.

Discretion. The granting of a new trial is peculiarly a matter of discretion with the trial court and in the absence of a showing of its abuse the ruling will not be disturbed. Evidence considered and held insufficient to show an abuse of discretion. *Idem*.

Where a motion for a new trial is based upon several grounds and is sustained generally, the appellant must not only show an abuse of discretion but that none of the grounds were good, to obtain a reversal. *Hydinger v. Railway Co.*, 222.

Instructions. An instruction on the theory that an issue is in the case which is not in fact tendered by the pleadings, is ground for a new trial. *Idem*.

Misconduct of juror. Proof that jurymen, while deliberating upon the case, stated their personal knowledge of facts related.
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evant to the issues, and that outsiders discussed the case in the presence of members of the jury in such a manner as to create prejudice, will authorize a new trial. *Idem*.

Newly discovered evidence. It is not error to deny a new trial on the ground of newly discovered evidence, where the witness was present and testified at the trial and his statement in the affidavit relied upon in support of the motion is denied. *Barber v. Maden*, 402.

Reduction of verdict. It is error for a trial court to reduce a verdict and enter judgment without giving the party against whom it is to be entered the option of accepting the same or submitting to a new trial. *Idem*.

NON EXPERT TESTIMONY. See EVIDENCE,

NOTES AND BILLS. See BILLS AND NOTES.

NOTICE.

Appeal. Service of notice of appeal need not be made on co-parties whose interests cannot be prejudicially affected by the appeal. *Ewart v. Ewart*, 219.

The statement in an abstract that appellant gave notice of appeal to defendant and the clerk of the court from which the appeal was taken, and secured his fees, is sufficient to confer jurisdiction over a simple statement in denial that the appeal was perfected as required by law and that the notice of appeal was insufficient. *Dolan v. Blast Furnace Co.*, 254.

Assessment of property. Notice to a taxpayer of the proposed assessment of omitted property must be given within five years from the date at which the same should have been assessed, or the same will be barred by the statute. *Schoonover v. Petcina*, 261.

Of subcontractor's claims. A subcontractor who furnishes material for the construction of county bridges under an agreement with the principal contractor alone, is charged with notice of the terms and conditions of the principal contract, and his rights are limited thereby; and where the county has lawfully discharged its obligation to the contractor prior to notice of the subcontractor's claim, or where the contract is void for fraud, the subcontractor has no recourse against the county. *Modern Steel Structural Co. v. Van Buren County*, 606.

Insurance: Notice of conditions. Where the delivery of an insurance policy and the payment of a contingent fee are contemporaneous acts, the assured is not chargeable with

NOTICE Continued

TO

ORDINANCES

knowledge of the provisions of the policy at the time the fee was paid. *Lounghoe v. Insurance Co.*, 374.

To mortgagee. Neither the fact that a mortgagor's title was based on a deed from her husband expressing a consideration of "love and affection" nor that a judgment was entered against the husband shortly after the conveyance, amounted to notice to the mortgagee of a defective title. *Glassburn v. Wireman*, 478.

Receiver's final report. Where a notice of hearing on a receiver's final report is signed by no one and addressed to no one, and the order fixing the time of hearing of the report and for service of the notice is not entered of record until after the service is made, there is an entire lack of notice, and the court is without jurisdiction to enter an order of discharge based thereon. *Williams v. Loan Co.*, 22.

Although notice of a receiver's final report and fixing the time of hearing thereon is not required by statute, yet where it is required by an order of court, a discharge procured without compliance may be set aside. *Idem*.

Secondary evidence. Where the primary proof of notice to a city of injury from a defective walk is shown to have been lost, secondary evidence is admissible. *Considine v. City of Dubuque*, 284.

NUISANCE.

Abatement. Where the county constructed a highway ditch in such manner that the surface water from the land of one landowner was made to flow unnaturally over the land of another, the latter had the right to abate the nuisance so created by going upon the highway and filling the ditch. *Schofield v. Cooper*, 334.

ORDINANCES.

Where the statute requires an ordinance for the exercise of a power conferred upon a city, the proceedings of the city without the ordinance are void. *Martin v. Oskaloosa*, 680.

Although the statutes may not specifically require an ordinance for the exercise of a delegated power, yet if the statute is not specific as to the method, an ordinance may be necessary, and when enacted must be pursued. *Idem*.

Construction. The provisions of an ordinance intended to vacate portions of certain streets are construed and held sufficient to effect that purpose, although providing that upon abandon-

ORDINANCES Continued

TO

PARENT AND CHILD

ment by the company, the title shall revert in the city. *Harrington v. Railway Co.*, 388.

Intoxicating liquors. A city has power under Code, section 680, to enact an ordinance prohibiting the keeping of a place of business, resorted to for the purpose of drinking intoxicating liquor, open on Sunday. *Town of Lovilia v. Cobb*, 557.

Resolutions. Generally the authority providing for an exercise of a power granted to a city by the legislature should be by ordinance rather than by resolution, but where the council is required by the statute or a general ordinance to act simply by a vote or otherwise, a resolution is sufficient. *Martin v. Oskaloosa*, 680.

Special assessments. Where an ordinance authorizing an assessment of abutting property to pay street improvements is wholly void, and no valid reassessment thus ordered can be made, a subsequent ordinance providing a legal method will not sustain the prior proceedings. *Idem*.

Sewerage. In the absence of a valid ordinance or resolution directing the construction of sewerage, a city council can not make a valid municipal obligation with respect thereto. *Citizens' Bank of Des Moines v. City of Spencer*, 101.

Title. An ordinance prohibiting the keeping of a place, resorted to for the purpose of drinking liquors, open on Sunday, is comprehended in a title "an ordinance concerning misdemeanors." *Town of Lovilia v. Cobb*, 557.

ORDINARY CARE. See NEGLIGENCE.

PAIN AND SUFFERING.

Where there was evidence that at the time of the trial plaintiff was suffering pain from the injury, an instruction that the jury should allow such damages on account of the future pain and anguish as the evidence warranted, was correct, although the injury was not shown to be permanent. *Achey v. City of Marion*, 47.

PARENT AND CHILD.

Advancements: Trusts: Pleadings. As between parent and child a conveyance of real property is presumed to be an advancement, but this presumption may be overcome by clear and satisfactory proof showing a trust; but to admit proof of a trust the facts relied upon must be pleaded. *Hoon v. Hoon*, 391.

PARENT AND CHILD Continued

TO

PARTITION

Presumption of fraud. The mere relationship of a parent and adult child will not constitute such a state of confidence as to raise a presumption of fraud, but it will be considered in connection with other facts and circumstances for the purpose of establishing a trust. *Gregory v. Bowlsby*, 588.

Trusts. Where a father having the confidences of his children who are members of his family, by promises which he did not intend to perform induced them to convey to him their interest in land, a court of equity will decree a constructive trust in their favor. *Idem*.

PARTIES.

Appeal: Necessary parties. Service of notice of appeal need not be made on coparties whose interests cannot be prejudicially affected by the appeal. *Ewart v. Ewart*, 219.

A defendant cannot complain that the plaintiff, having been adjudged a bankrupt after the trial, prosecutes the appeal in his own name, the trustee in bankruptcy having filed his written consent thereto. *Christy v. Stedman*, 428.

Contract with county: Validity. The invalidity of a contract made by a county and the issuance of a warrant thereunder, cannot be determined in a suit between the county and its treasurer to restrain the payment of the warrant, to which the person with whom the contract was made and warrant issued was not a party. *Nelson v. Harrison County*, 436.

Setting aside receiver's Report. The court may set aside the final report and discharge of a receiver on the petition of any person interested, without requiring other creditors or the original parties to the litigation to be brought in. *Williams v. Loan Co.*, 22.

Specific performance. Where a deed to real property pursuant to a contract of sale was deposited with a bank in escrow, the bank was a proper party to an action for specific performance of the contract where delivery of the deed was part of the relief asked, and especially where the bank had taken a mortgage upon the property subsequent to the execution of the contract. *Rea v. Ferguson*, 704.

PARTITION.

Evidence: Deed given as security. In an action to partition the property belonging to an estate, the evidence is reviewed and held to show that a deed given deceased by one of the heirs was in fact a mortgage, and that the indebtedness secured thereby had been paid. *Ewart v. Ewart*, 219.

PARTITION OF LINE FENCES

TO

PENSION MONEY

PARTITION OF LINE FENCES.

There are but two methods of dividing partition fences, one by order of the fence viewers, and the other by written agreement as provided by Code, sections 2356 and 2361; and a division based on a mere understanding of one landowner with the tenants of the other is of no effect. *De Mers v. Rohan*, 488.

Duty to maintain. Where there has been no legal partition of a division fence, the duty of maintaining the entire fence rests on both owners alike, and neither can complain of the neglect of the other. *Idem*.

PARTNERSHIP.

Partnership contract: Consideration. An oral agreement by which defendant was to purchase in his own name a single tract of land, paying therefor with his own funds, to be repaid by a sale of mining rights, and to which plaintiffs neither contributed nor engaged to contribute anything, if sufficient to establish a partnership in the profits, still the agreement could not be enforced for want of consideration. *Forrest v. O'Bryan*, 571.

Resulting trust. A mere verbal agreement whereby defendant was to purchase a tract of land in his own name and with his own funds to be resold and the profits above cost to be the joint property of plaintiffs and defendant, and to the purchase of which plaintiffs contributed nothing gave them no right or interest in the land; nor was defendant's relation to the claimed partnership shown to have been such as to raise a trust in favor of plaintiffs. *Idem*

PARTY WALLS.

Chimney flues: Injunction. Where a party wall is erected without request by an adjoining owner for flues or joist bearings, as provided in Code, section 2998, and chimney flues are constructed therein by the owner for his own use, a sale of an undivided one half interest in the wall, simply, without reference to the flues, will not entitle the adjoining owner to use the same in a manner detrimental to his co-owner. *Koolbeck v. Baughn*, 194.

PENSION MONEY.

Exemptions. Land purchased with pension money is exempt from execution, although a portion of the price may have

PENSION MONEY Continued

TO

PHYSICIANS

been paid from the proceeds of a sale of coal rights therein, as the same constitute an interest in the land and are not the increase or produce derived from the land; and the property may be conveyed free from liability for grantor's debts. *Smyth v. Hall*, 627.

PERMITS TO SELL LIQUOR. See **DRUGGISTS' PERMITS.**

PERSONAL SERVICES. See **CONTRACTS.**

PHYSICIANS.

Contagious disease: Compensation of physician: Liability of county. Under section 2570, Code of 1897, the liability of a county became absolute for the bill of a physician employed by a local board of health to attend a person afflicted with contagious disease, as the same was allowed by the board of health, where it appeared that the patient and those liable for his support were unable to pay. *Resner v. Carroll County*, 423.

Expert evidence. In an action for the negligent treatment of a dislocated shoulder, the evidence is reviewed, and in view of the conflict, is held to present a question for the jury as to whether the method of treatment adopted was proper. *Tomer v. Aiken*, 114.

Where the employment of a physician has been terminated, he may refuse further attendance, and such refusal, where there is no further showing save the patient was suffering the pain usual in such cases, will not justify the admission of evidence that the same amounted to improper treatment; nor under the circumstances was negligence of the attending physician shown. *Idem.*

Negligent treatment: Diagnosis. The fact that a physician improperly diagnosed an injury as a fracture rather than as a dislocation was immaterial on the question of negligent treatment, where the treatment was suitable to reduce a dislocation. *Idem.*

In an action for damages resulting from an alleged negligent treatment of an injury to plaintiff's shoulder bones, the question of whether the injury was diagnosed as a dislocation or as a fracture, was, under the conflicting evidence, one for the jury. *Idem.*

Negligence of a physician cannot be predicated on a failure to effect a cure of a dislocated shoulder bone, where it is shown that favorable results are not always obtained under any form of treatment. *Idem.*

PHYSICIANS Continued

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PLEADINGS

Negligence in permitting certain intervals to elapse between a physician's visits depends on the custom or practice in similar localities, and not on the custom of a particular physician in his own practice. *Idem*.

Post mortem examination: Consent. Consent to a post mortem examination to ascertain the cause of death implies permission to conduct the examination in the approved manner including the removal of organs for microscopic examination where necessary and proper, unless such permission is expressly withheld, especially where the parts were duly returned and replaced for burial. *Winkler v. Hawkes & Ackley*, 474.

Privilege: Waiver. The fact that a physician, called by defendant to examine plaintiff immediately after his injury, testified on plaintiff's preliminary examination as to his competency under Code, section 4608, that he found plaintiff in an unconscious condition, substantially as he had stated in defendant's prior examination, did not amount to a waiver of plaintiff's right to object that the witness was within the privilege of the statute, as the preliminary examination disclosed no new facts and the same was not affirmative proof of any material fact for plaintiff. *Nugent v. Packing Co.*, 517.

PLEADINGS.

AMENDMENTS.

It is not an abuse of discretion to permit the filing of an amendment after the evidence is in, to conform the pleadings to the proof. *Johnson v. Insurance Co.*, 565.

In an action to restrain the removal of fixtures by a tenant, it was not an abuse of discretion to strike from defendant's amended answer allegations alleging a new cause of action for conversion of the fixtures, by way of a counterclaim, so far as the same asked for affirmative relief, and permitting it to stand as to the defensive matter. *Daly v. Simonson*, 716.

Failure to plead to an amendment. Where the parties proceed to trial without answer or other pleading to an amended petition, the plaintiff cannot afterwards claim that defendant is in default or that the allegations in the amendment should be treated as confessed. *Gregory v. Bowsby*, 588.

OF THE PETITION.

Breach of warranty. Where the allegations of a petition indicated an intention to rely on a breach of warranty, the further allegation that defendant knew his statements to be false, did

PLEADINGS Continued

not convert the action into one for misrepresentation and fraud. *Wingate v. Johnson*, 154.

Election of remedies. A plaintiff may plead as many causes of action of the same general character as he may possess in separate counts, and is not required to elect under which he will proceed. *Watters v. Waterloo*, 199.

Counterclaim. An independent cause of action cannot be pleaded in a replevin action either as a counterclaim or otherwise as a defense. *Sylvester v. Ammons*, 140.

Estoppel. An estoppel must be pleaded. *Continental Ins. Co. v. Clark & Cressler*, 274.

Filing: Discretion. The subsequent approval of the filing of a pleading is as effective as though permission had been granted in advance; and the court's discretion in permitting the dilatory filing of pleadings will not be disturbed on appeal in the absence of its abuse. *Rice v. Bolton*, 654.

Fraud. Fraud cannot be pleaded in general terms, but the facts relied upon must be stated. *Hoon v. Hoon*, 391.

In a recovery of personal property claimed to have been wrongfully taken under a mortgage, it is competent to allege and prove that the mortgage was procured by fraud, and that it is without consideration. *Sylvester v. Ammons*, 140.

Negligence. In an action for negligence against a railway company, an allegation of the petition that defendant obstructed a street by its cars, should be stricken, where it was not also alleged that the street extended over the right-of-way. *Eakins v. Railway Co.*, 324.

Where an action was bottomed on negligence and the wrong was willful, the petition need not negative contributory negligence. *Continental Ins. Co. v. Clark & Cressler*, 274.

New trial. An application for a new trial based on a supposed agreement with counsel, which fails to allege that the agreement was not performed, is insufficient. *Tschohl v. Insurance Co.*, 211.

An application for a new trial after judgment by default must set forth a good defense to the action. *Idem*.

Trusts. To admit proof of a trust the facts relied upon must be pleaded. *Hoon v. Hoon*, 391.

Assessment of omitted property. No formal pleadings are required in a proceeding to assess omitted property, and a taxpayer's general objection to an assessment, made before the treasurer, that the items of moneys and credits proposed

PLEADINGS Continued

to be assessed were not items for which he was liable for the years specified, and that his indebtedness for those years which he was entitled to set off against the same was equal to the amount of his moneys and credits, was sufficiently specific to raise the issue on appeal. *Schoonover v. Pitcina*, 261.

DEFENSES.

Interrogatories: Failure to answer: Judgment. Code, section 3610, does not contemplate a summary entry of judgment because of indefinite or unsatisfactory answers by a municipal corporation to interrogatories attached to a pleading; and such an order will not generally be entered without an opportunity to the delinquent party to correct the fault. *Modern Steel Structural Co. v. Van Buren County*, 606.

Limitation of actions. Limitation is an affirmative defense and must be pleaded by allegation of facts constituting the same, otherwise it is waived. *Borghart v. Cedar Rapids*, 313.

Plea in bar. One who has not pleaded a judgment in bar of the action cannot raise the question on appeal. *Newburn v. Lucas*, 85.

Reply: Costs. Where the appellant in his reply brief failed to discuss any matters not sufficiently presented in appellee's opening argument, to enable a full response in appellant's main argument, the costs of the reply will be taxed to him. *Schoonover v. Pitcina*, 261.

MOTIONS.

Admission of evidence: Error. Error in refusing to strike an ordinance pleaded as authority to make a post mortem examination, was cured by an instruction that the ordinance gave no such authority. *Winkler v. Hawkes & Ackley*, 474.

Judgment on the pleadings. A verified answer and counterclaim will not be taken as true and judgment rendered thereon, because of an unverified reply. The proper practice is a motion to strike. *Newburn v. Lucas*, 85.

Objection to pleadings. An objection to the insufficiency of a pleading which was in no manner tested on the trial, is unavailable on appeal, where enough was alleged to present the issue upon which the case was tried, and no objection was made to the evidence in support thereof. *Fox v. National Bank*, 481.

POISON

TO

POLICE POWER

POISON.

Sale of poison: Negligence. The sale of poisonous substances without labeling the same as required by law, is negligence *per se*. *Burk v. Creamery Package Mfg. Co.*, 730.

In an action for the death of plaintiff's son caused from drinking a poisonous liquid sold by defendant without labeling as required by law, it was incumbent on plaintiff to show that such violation of the statute was the proximate cause of the death. *Idem*.

Negligence on the part of the purchaser of poison will not necessarily excuse the vendor for his violation of the law requiring it to be labeled. *Idem*.

Where a jug of poison was deposited in a creamery at a place where similar receptacles were usually kept containing buttermilk, permission of the creamery manager to take a drink of buttermilk was not of itself negligence, it not appearing that he knew one of the jugs to contain poison. *Idem*.

Under the issues, an instruction that the fact that employes of a creamery, at which place the deceased drank poison from a jug supposed to contain buttermilk, knew the jug contained poison, did not relieve defendant from the charge of negligence, provided it sold the same without labeling as required by law, was not objectionable as eliminating from the case the doctrine of proximate cause. *Idem*.

POLICE POWER.

Ordinances. Generally the authority providing for an exercise of a power granted to a city by the legislature should be by ordinance rather than by resolution, but where the council is required by the statute or a general ordinance to act simply by a vote or otherwise, a resolution is sufficient. *Martin v. Oskaloosa*, 680.

Although the statutes may not specifically require an ordinance for the exercise of a delegated power, yet if the statute is not specific as to the method, an ordinance may be necessary, and when enacted must be pursued. *Idem*.

Where the statute requires an ordinance for the exercise of a power conferred upon a city, the proceedings of the city without the ordinance are void. *Idem*.

A city has power under Code, section 680, to enact an ordinance prohibiting the keeping of a place of business, resorted to for the purpose of drinking intoxicating liquor, open on Sunday. *Town of Lovilla v. Cobb*, 557.

POSSESSION OF STOLEN PROPERTY

TO

PRACTICE

POSSESSION OF STOLEN PROPERTY. See BURGLARY.**POST MORTEM EXAMINATION.**

Consent. Consent to a post mortem examination to ascertain the cause of death implies permission to conduct the examination in the approved manner including the removal of organs for microscopic examination where necessary and proper, unless such permission is expressly withheld, especially where the parts were duly returned and replaced for burial. *Winkler v. Hawkes & Ackley*, 474.

PRACTICE.**IN SUPREME COURT.**

Admission of evidence: **Reversible error.** A cause will not be reversed because a witness has been permitted to answer leading questions or to state a conclusion, where it is apparent from the whole evidence that no prejudice resulted, although technically the rulings were incorrect. *Roush v. Gesman Bros. & Grant*, 493.

Appeals. An appeal to the supreme court which is not presented in substantial conformity with the rules governing the same, is not entitled to consideration. *Winkler v. Hawkes & Ackley*, 474.

It does not necessarily follow from the fact that the cross-examination of certain witnesses does not appear in appellant's abstract, that the same does not contain the substance of the evidence as required to be set out; this objection should be met by an amended or additional abstract. *Wolf v. Elevator Co.*, 659.

An appeal does not lie from an order refusing to direct a verdict in favor of a cross defendant, as to whom there had been no trial. *Bussell v. City of Fort Dodge*, 308.

An order for continuance against a defendant to a cross petition is not appealable. *Idem*.

The insufficiency of a pleading which states a cause of action, cannot be first assailed in the appellate court. *Newburn v. Lucas*, 85.

Defaults: **Setting aside.** The order of the trial court in setting aside a default will not be disturbed on appeal unless a clear abuse of discretion is shown. *Carver v. Seevers & Bryan*, 669.

Setting aside a default to permit a defense on the merits is a matter largely within the discretion of the trial court, and

PRACTICE Continued

its order will not be disturbed except in cases of abuse. *Klepfer v. City of Keokuk*, 592.

Defective record: Costs. Although an abstract is not so defective that a motion to affirm or strike should be sustained, still where the questions and answers are needlessly set out the cost of printing may be taxed to appellant on reversal. *Plagge v. Mensing*, 737.

New trial. Where a motion for a new trial is based upon several grounds and is sustained generally, the appellant must not only show an abuse of discretion but that none of the grounds were good, to obtain a reversal. *Hydinger v. Railway Co.*, 222.

Plea in bar. One who has not pleaded a judgment in bar of the action cannot raise the question on appeal. *Newburn v. Lucas*, 85.

Trial de novo. Although a case is triable *de novo* on appeal, in view of the opportunity of the trial judge to observe the demeanor of the witnesses, his findings will be disturbed with reluctance. *Johnson v. Insurance Co.*, 565.

Reasonable doubt: Review on appeal. The appellate court will not pass on the question of reasonable doubt in reviewing the evidence, but if the verdict has support and the jury has been properly instructed, its finding on the question is final. *State v. Pray*, 248.

Receivers: Final Report: Setting aside. A receiver is so largely under the direction and control of the district court that an order setting aside a final report and discharge will not be disturbed on appeal unless there is a clear abuse of discretion. *Williams v. Loan Co.*, 22.

Review of directed verdict. A motion to direct a verdict will only be reviewed on the grounds on which it was submitted in the trial court. *Earl v. Cedar Rapids*, 361.

IN DISTRICT COURT.

Admission of evidence: Error. Error in refusing to strike an ordinance pleaded as authority to make a post mortem examination, was cured by an instruction that the ordinance gave no such authority. *Winkler v. Hawkes & Ackley*, 474.

Appointment of guardian ad litem: Collateral attack. An order of court appointing a guardian *ad litem* and directing the sale of a minor's property after service of notice but prior to the date specified therein, though irregular, is not subject to collateral attack where no application for its correction was

PRACTICE Continued

made during the term and the record was subsequently approved. *Rice v. Bolton*, 654.

Arrest of judgment. Where a petition in an action on the bond for damages for the wrongful issuance of a temporary injunction fails to state that the main action has been determined, a motion in arrest of judgment thereon, under Code, section 3758, will lie. *Lacey v. Davis*, 675.

Contempt: Procedure. Under the Code, a denial by the accused of the contempt charged does not operate, as at common law, to purge him of the offense, but the court is to determine by a trial the facts put in issue by the answer; and a contrary view is not indicated by the provisions of Code, section 2407, relating to the violation of a liquor nuisance injunction. *Drady v. District Court*, 345.

A contempt proceeding may be tried by any judge of the court in which the offense was committed. *Idem*.

Filing of pleadings. The subsequent approval of the filing of a pleading is as effective as though permission had been granted in advance; and the court's discretion in permitting the dilatory filing of pleadings will not be disturbed on appeal in the absence of its abuse. *Rice v. Bolton*, 654.

Defaults: Setting aside. Where time to file a substituted petition is given "until" a certain day, the day named will be excluded unless a contrary intention appears, and a default judgment taken upon a petition filed on the day so named will be set aside without the filing of an affidavit of merits and an answer. *Carver v. Seevers & Bryan*, 669.

In an action for a personal injury, an affidavit of merits in support of a motion to set aside a default, which alleges a belief that the accident was the result of plaintiff's negligence and not that of defendant, is sufficient without setting out all the facts upon which the conclusion rests. *Klepfer v. City of Keokuk*, 592.

Dismissal of actions: Ratification: Estoppel. The denial of a count of the petition, tender of the amount claimed and offer to confess judgment therefor, which are refused, will not preclude the right of plaintiff to dismiss as to that count at any time before judgment; nor will it amount to a ratification or work an estoppel. *Continental Insurance Co. v. Clark & Cressler*, 274.

Instructions. In a personal injury action, it is proper to submit defendant's theory of the case, though supported by the testimony of but one witness. *Christie v. Stedman*, 428.

PRACTICE Continued

In submitting defendant's case as disclosed by his evidence, the court should also state the situation in the same way so far as favorable to the plaintiff and arising out of the same evidence. *Idem*.

Jury trial: Waiver. A defendant may waive a jury on the trial of an appeal from a conviction before a mayor for the violation of an ordinance. *Town of Lovilia v. Cobb*, 557.

Motion book: Notation of orders. Where a rule of court requires all orders made while in session to be entered on a calendar or motion docket, a receiver should note thereon the filing of his final report, petition for discharge and the order fixing the time of hearing and manner of service. *Williams v. Loan Co.*, 22.

New trial: Discretion: Evidence. The granting of a new trial is peculiarly a matter of discretion with the trial court and in the absence of a showing of its abuse the ruling will not be disturbed. Evidence considered and held insufficient to show an abuse of discretion. *Tschohl v. Insurance Co.*, 211.

An application for a new trial based on a supposed agreement with counsel, which fails to allege that the agreement was not performed, is insufficient. *Idem*.

An application for a new trial after judgment by default must set forth a good defense to the action. *Idem*.

Pleadings. It is not an abuse of discretion to permit the filing of an amendment, after the evidence is in, to conform the pleadings to the proof. *Johnson v. Insurance Co.*, 565.

Where the parties proceed to trial without answer or other pleading to an amended petition, the plaintiff cannot afterwards claim that defendant is in default or that the allegations in the amendment should be treated as confessed. *Gregory v. Bowlsby*, 588.

A verified answer and counterclaim will not be taken as true and judgment rendered thereon, because of an unverified reply. The proper practice is a motion to strike. *Newburn v. Lucas*, 85.

Setting aside receiver's report. The court may set aside the final report and discharge of a receiver on the petition of any person interested, without requiring other creditors or the original parties to the litigation to be brought in. *Williams v. Loan Co.*, 22.

Although notice of a receiver's final report and fixing the time of hearing thereon is not required by statute, yet where it is

PRACTICE Continued

TO

PRACTICE OF MEDICINE

required by an order of the court, a discharge procured without compliance may be set aside. *Idem.*

The overruling of a motion to set aside an order discharging a receiver, because not the proper remedy, is not a bar to a petition for the same purpose. *Idem.*

Special interrogatories. Special interrogatories in the nature of a cross-examination of the jury should be refused. *Greenlee v. Mosnat*, 330.

It was error to submit a special interrogatory as to whether defendant guaranteed the quantity of land conveyed, where the real issue was whether defendant had made such representations that plaintiff had the right to rely thereon as a warranty. *Boddy v. Henry*, 31.

Trial de novo. Where an assessment of omitted property has been made and an appeal taken, it becomes the duty of the court to inquire into and determine *de novo* from all the evidence the liability for the assessment; and an unverified statement of omitted taxes prepared by agents of the county employed to discover the same, and the assessment thereof, does not make a *prima facie* case for the county requiring the taxpayer to show that specific items were erroneously listed. *Schoonover v. Petcina*, 261.

Reduction of verdict. It is error for a trial court to reduce a verdict and enter judgment without giving the party against whom it is to be entered the option of accepting the same or submitting to a new trial. *Barber v. Maden*, 402.

Setting verdict aside. Inaccurate answers to special interrogatories not calling for ultimate facts, nor for facts of such importance that a finding thereon against the weight of the testimony is necessarily indicative of passion, do not constitute ground for setting aside the general verdict. *Kuehl v. Railway Co.*, 638.

PRACTICE OF MEDICINE.

Physicians: Negligence: Diagnosis. In an action for damages resulting from an alleged negligent treatment of an injury to plaintiff's shoulder bones, the question of whether the injury was diagnosed as a dislocation or as a fracture, was, under the conflicting evidence, one for the jury. *Tomer v. Aiken*, 114.

In an action for the negligent treatment of a dislocated shoulder, the evidence is reviewed, and in view of the conflict, is held to present a question for the jury as to whether the method of treatment adopted was proper. *Idem.*

Where the employment of a physician has been terminated, he may refuse further attendance, and such refusal, where there is no further showing save the patient was suffering the pain usual in such cases, will not justify the admission of evidence that the same amounted to improper treatment; nor under the circumstances was negligence of the attending physician shown.

Idem.

Negligence of a physician cannot be predicated on a failure to effect a cure of a dislocated shoulder bone, where it is shown that favorable results are not always obtained under any form of treatment. *Idem.*

Negligence in permitting certain intervals to elapse between a physician's visits depends on the custom or practice in similar localities, and not on the custom of a particular physician in his own practice. *Idem.*

The fact that a physician improperly diagnosed an injury as a fracture rather than as a dislocation was immaterial on the question of negligent treatment, where the treatment was suitable to reduce a dislocation. *Idem.*

Post mortem examination: Consent. Consent to a post mortem examination to ascertain the cause of death implies permission to conduct the examination in the approved manner including the removal of organs for microscopic examination where necessary and proper, unless such permission is expressly withheld, especially where the parts were duly returned and replaced for burial. *Winkler v. Hawkes & Ackley*, 474.

PRESUMPTIONS.

Certification of records. The certificate of a clerk of courts of a foreign State which refers to and is attached to a copy of the record certified, will be presumed to have been lawfully made and to certify to the copy of the record to which it is attached, although made on a separate sheet. *Woodworth v. McKee*, 714.

Jurisdiction. Where the certificate to a judgment record of another State shows that the judgment was rendered by a court of record with a clerk and seal, it will be presumed that the court had jurisdiction of the parties and the subject matter, until the contrary is shown. *Woodworth v. McKee*, 714.

Presumption of fraud. The mere relationship of a parent and adult child will not constitute such a state of confidence as to raise a presumption of fraud, but it will be considered in connection with other facts and circumstances for the purpose of establishing a trust. *Gregory v. Bowsby*, 588.

PRESUMPTIONS Continued

TO

PUBLIC LANDS

Presumption of authority to insure. The assured may rightfully assume that a company issuing a policy of insurance is authorized to do business in this State, in the absence of information to the contrary. *Hartman & Daniels v. Hollowell*, 643.

Sale of intestate's land: Description. In a suit to set aside the sale of an intestate's lands, the description of the same in the order of sale will be presumed to exemplify what was intended, in the absence of an averment to the contrary. *Rice v. Bolton*, 654.

PRIVILEGED COMMUNICATIONS. See EVIDENCE.

PROXIMATE CAUSE. SEE NEGLIGENCE.

Where plaintiff was injured from a fall due to an alleged defective sidewalk and subsequently sustained other injuries from a fall on another street, due to the negligence of the city in failing to keep the walk clear of snow and ice, it is held that the relation of the alleged negligence of the city causing the first injury to the latter accident, was not such as to constitute the former the natural and proximate cause of the latter. *Watters v. Waterloo*, 199.

Where several proximate causes contribute to an accident, and each is an effective cause, the result may be attributed to any or all of the causes. *Burk v. Creamery Package Mfg. Co.*, 730.

In an action for the death of plaintiff's son caused from drinking a poisonous liquid sold by defendant without labeling as required by law, it was incumbent on plaintiff to show that such violation of the statute was the proximate cause of the death. *Idem*.

Instructions. Under the issues, an instruction that the fact that employes of a creamery, at which place the deceased drank poison from a jug supposed to contain buttermilk, knew the jug contained poison, did not relieve defendant from the charge of negligence, provided it sold the same without labeling as required by law, was not objectionable as eliminating from the case the doctrine of proximate cause. *Idem*.

In an action for negligence, it is not error for the court to use the term "proximate cause" in an instruction, without defining it. *Idem*.

PUBLIC LANDS.

Limitation of actions: When statute commences to run. Where a railway company has perfected its title to land under a grant and nothing remains but to receive a certificate from the gov-

PUBLIC LANDS Continued

TO

RAILWAYS

ernment, the statute of limitations will commence to run in favor of one claiming an adverse interest at the date such title was perfected, but in the absence of evidence to the contrary, the company will be presumed to have acquired title on the date of the certificate, and the statute will run from that time. *Iowa Railroad Land Co. v. Fehring*, 1.

PUBLIC POLICY.

Discharge in bankruptcy. The costs in a criminal prosecution are not part of the fine imposed as a punishment for the offense, and a release of the costs by discharge in bankruptcy is not contrary to public policy because interfering with the administration of the criminal law. *Olds v. Forrester*, 456.

PUBLIC RECORDS.

Certification of records. The certificate of a clerk of courts of a foreign State which refers to and is attached to a copy of the record certified, will be presumed to have been lawfully made and to certify to the copy of the record to which it is attached, although made on a separate sheet. *Woodworth v. McKee*, 714.

QUIETING TITLE.

Municipal assessments: Benefits: Laches. Where a municipal assessment for grading a street is wholly void, the property owner is not liable for benefits conferred; nor will delay in suing to quiet title against the assessment constitute a defense to that action. *Carter v. Cemansky*, 506.

RAILWAYS. SEE NEGLIGENCE.

Construction of bridges. Unless the negligent act of a railway company in constructing a bridge was the producing cause in flooding plaintiff's land, it was not liable for the injury. The court's instructions when construed together, are held correct. *Vyse v. The Chicago, B. C. & Q. Ry. Co.*, 90.

Where a railway company was authorized to construct its road over streams in such manner as not to unnecessarily impede their flow and an issue of unnecessary obstruction was submitted, an instruction that defendant might, without liability, obstruct the stream so far as reasonably necessary to maintain its bridge in a safe condition, was as favorable as defendant was entitled to. *Idem*.

Eminent domain: Appeal. Where a railway company appealed from an award of damages in a condemnation proceeding for

RAILWAYS Continued

right-of-way, an appeal by the landowner was not necessary in order that he might procure a larger award on the trial of the company's appeal. *McKinnon v. Railway Co.*, 426.

Failure to fence: Instruction. In an action for the killing of an animal claimed to have strayed upon defendant's right-of-way by reason of a defective fence, an instruction that plaintiff could only recover upon proof that the fence was out of repair, which was shown to defendant or which had existed for such a length of time that knowledge should be imputed to it, was as favorable as defendant was entitled to. *Klay v. Railway Co.*, 671.

Evidence. In an action against a railway company for the killing of a steer, resulting as alleged from a defective right-of-way fence, the evidence is reviewed and held to support a finding that the animal was upon the right-of-way and not upon the public crossing when killed. *Idem*.

Negligence: Evidence. In an action for injury to a brakeman, the evidence is considered and held insufficient to support a submission on the theory that the engineer was negligent in suddenly stopping his train. *Allen v. Railway Co.*, 213.

In an action for the death of a railroad contractor, evidence of conversations between a train dispatcher and a telegraph operator with reference to requiring trains to slow down as they approached the work, was inadmissible on the question of the company's negligence, it appearing that the dispatcher was connected with another division of the road and there being no showing of authority or that anyone in authority had knowledge of the work. *Carpenter v. Ry. Co.*, 94.

Where an engineer had testified that he did not sound the whistle, and denied on cross-examination that at a certain time and place and in the presence of certain persons he stated that he did give the signal, it was competent to show that he made the latter statement, not as an admission binding upon the company but for impeachment purposes. *Gregory v. Railway Co.*, 230.

The liability of a railway company for a personal injury is dependent upon a violation of some duty which it owes the plaintiff. The evidence is reviewed and held insufficient to establish negligence, and to support a directed verdict for defendant. *Eakins v. Railway Co.*, 324.

A witness familiar with the running of trains and shown to have a general knowledge of their rates of speed, may give an

RAILWAYS Continued

opinion as to the speed of a particular train which he has observed. *Gregory v. Railway Co.*, 230.

Evidence in an action for the death of a girl two years old, that her parents were farmers and that the wages of female school teachers in that locality were from \$30.00 to \$35.00 per month, is held sufficient to take the case to the jury on the value of her life to her estate. *Idem.*

Where one was fully advised and knew of the impending danger from an approaching train, and death resulted from his failure to avoid the accident, negligence of the company could not be predicated on the failure of the engine men to ring the bell or sound the whistle, it appearing that the duty to so warn the deceased did not arise until after he knew of the danger; nor was such failure the proximate cause of the injury. *Carpenter v. The Chicago, R. I. & P. Ry. Co.*, 94.

The liability of a railway company for the death of a trespasser upon its tracks, is not dependent upon the willful and wanton act of the trainmen, but a failure to exercise the highest possible degree of care to avoid the accident after the peril is discovered, will fix its liability. *Gregory v. Railway Co.*, 230.

Where an engineer discovered a child of tender years upon the track, the question of whether his failure to sound the whistle was the exercise of a prudent judgment, was one of fact for the jury. *Idem.*

A railway company is not liable because of a failure of the engineer to sound the whistle when the accident would inevitably have happened, but the question of whether such signal would probably have avoided the accident is for the jury. *Idem.*

Evidence that defendant's employes had worked the track between the time of the accident and the inspection of the track by plaintiff, was admissible on the question of whether any evidences of the position of an animal when killed had been obliterated, and if so whether done purposely; also as bearing upon the credibility of the witnesses who did the work and who testified to the nonexistence of hoof prints. *Klay v. Railway Co.*, 671.

Contributory negligence: Evidence. In an action for the death of a packing house employé struck by a passing car while crossing defendant's tracks in going from one building to another, the evidence is reviewed and held that he was not guilty of contributory negligence as a matter of law, in not using a crossing or in failing to look and listen for an ap-

RAILWAYS 'Continued

proaching car, before going onto the tracks. *Booth v. Railway Co.*, 8.

In an action for injury to cattle at a public railway crossing, the evidence as to plaintiff's contributory negligence is held to present a question of fact for the jury. *Kuehl v. Railway Co.*, 638.

Pleadings. In an action for negligence against a railway company, an allegation of the petition that defendant obstructed a street by its cars, should be stricken, where it was not also alleged that the street extended over the right-of-way. *Eakins v. Railway Co.*, 324.

Instruction. In determining the question of an engineer's negligence in failing to sound the whistle after discovering a child upon the track, an instruction that the jury might consider, among other things, whether an alarm would have frightened the child, and if so, whether the result would have been to cause it to remain on the track or move off, was properly given. *Gregory v. Railway Co.*, 230.

Where the only negligence charged was want of care on the part of the engineer in failing to observe an order and in running his train at such speed as to make a sudden stop necessary, and the evidence showed that a sudden stoppage of the train was justified by the emergency, an instruction that for plaintiff to recover he must establish by a preponderance of evidence that while in the discharge of his duties as brakeman he was thrown from the train and injured, without fault on his part, by the negligence of the engineer in making a violent stoppage of the train, was error. *Allen v. Railway Co.*, 213.

Proximate cause. Whether the negligent failure of a railway company to sound the engine whistle as the train approached a public crossing was the proximate cause of the injury to cattle being driven over the crossing, was a question of fact for the jury. *Kuehl v. Railway Co.*, 638.

Street obstructions: Damages. Where a railroad embankment obstructs a street affording access to business property which has not been vacated, the owner is entitled to damages for depreciation in the value of his property caused thereby. *Idem.*

Trespassers. Where the employes of a packing house company have for years, with the knowledge of the railway company, been accustomed to cross its switch tracks in passing from one building to another about their work, and the railway company has offered no objection or obstruction to such use, it will

RAILWAYS Continued

TO

REAL PROPERTY

be held to have consented thereto, and one of such employes killed while so crossing its tracks was not a trespasser but a licensee. *Booth v. Railway Co.*, 8.

The testimony of enginemen as to when they first discovered the peril of a trespasser on the tracks is not conclusive on the subject, but all the circumstances bearing on the question are for the consideration of the jury. *Gregory v. Railway Co.*, 230.

Vacation of street for railway purposes: Damages. Where a street has been vacated by the city for railway purposes, one whose property has been injured by the construction of the road cannot recover damages of the railway company. *Harrington v. Railway Co.*, 388.

RAPE. SEE CRIMINAL LAW.

Complaint of prosecutrix. In rape, failure of the prosecutrix to make complaint affects only her credibility, and circumstances of excuse may be ~~shown to~~ negative any inference to be drawn from such failure. *State v. Icenbice*, 16.

Confession: Instructions. Where the commission of rape by someone was fully shown, the fact that evidence of confessions of defendant was introduced to supply the corroboration required to connect defendant with the crime, did not require an instruction that he could not be convicted on his confession not made in open court. *Idem*.

Identity of defendant. In a prosecution for rape, the confessions of defendant constitute sufficient evidence to take the case to the jury on the question of his identity. *Idem*.

RATIFICATION.

Fraud. The act of a grantor in a conveyance obtained by fraud, which does not amount to an intelligent assent to the conveyance after knowledge of the fraud, will not constitute a ratification. *Eighmy v. Brock*, 535.

REAL PROPERTY.

Executory contract for sale of land. As between the parties to an executory contract for the sale of land, where the vendor retains the possession, rents and profits until the conveyance is due, he is liable for the payment of accruing taxes in the absence of an agreement by which the purchaser assumes that obligation: and this rule is not affected by Code, section 1400. *Clinton v. Shugart*, 179.

REAL PROPERTY Continued

The provisions of an executory contract for the sale of land are considered, and it is held that there is nothing to indicate an understanding of the parties that the purchaser should pay the taxes falling due prior to a conveyance of the title. *Idem*.

Description of property: Presumption. In a suit to set aside the sale of an intestate's lands, the description of the same in the order of sale will be presumed to exemplify what was intended, in the absence of an averment to the contrary. *Rice v. Bolton*, 654.

False representations: Quantity of land. In an action for damages based on false representations as to the quantity of land conveyed, tax receipts delivered by defendant to plaintiff stating the number of acres, were admissible as tending to show the vendor's knowledge of the amount of land. *Boddy v. Henry*, 31.

Where a vendor represented the tract conveyed to contain "about" 17,000 acres when there was in fact but 15,300, such qualification did not defeat the vendee's right to damages for the false statement. *Idem*.

A refusal to guarantee the quantity or quality of property sold, is not inconsistent with a liability for false representations in respect thereto. *Idem*.

A purchaser of land may rely upon the vendor's representations as to the quantity, even though he makes a personal inspection, not amounting to an investigation to satisfy himself, from sources of the vendor and his agents. *Idem*.

Fraudulent conveyances. Where defendant gave a note in consideration for a conveyance procured by him through fraud and afterward discounted the same, on cancellation of the conveyance he was only entitled to credit for the actual amount paid for the note. *Eighmy v. Brock*, 535.

The agreement between a husband and his wife's parents to reimburse her to the extent of funds advanced him for family use by the parents, will support a conveyance of property from the husband to the wife in payment thereof, irrespective of any contract between them, or the husband's insolvency. *Clark Bros. v. Ford*, 460.

Rescission. Where defendants, having only an option to purchase land, agreed to convey it at a specified time under a contract of which time was the essence, and they were unable to procure title on that date, such breach of the contract entitled their purchaser to rescind. *Primm v. Wise & Stern*, 528.

REAL PROPERTY Continued

TO

REASSESSMENTS

A contract providing that vendors shall have a reasonable time after tender of an abstract to remedy defects in the title, does not contemplate a complete absence of title and delay for the purpose of procuring the same. *Idem*.

Taxation of contracts: What constitutes a credit. Where one purchases land, paying therefor and taking title in his own name, and in accordance with a previous understanding enters into a contract of lease for a rental based upon an interest rate on his investment, giving to the lessee an option to purchase the same within a specified time upon payment of its cost to the lessor, the transaction does not amount to a contract giving rise to any actual indebtedness which is assessable as a credit. *Schoonover v. Petcina*, 261.

Title: Notice to mortgagee. Neither the fact that a mortgagor's title was based on a deed from her husband expressing a consideration of "love and affection" nor that a judgment was entered against the husband shortly after the conveyance, amounted to notice to the mortgagee of a defective title. *Glassburn v. Wireman*, 478.

Wills: Participation in real estate. In the construction of the various provisions of the will and codicil in question, it is held that the widow as trustee held title to a certain eighty acres from which a bequest to one of the heirs was to be made equal to that of others, and that the balance was intended for the use of still other heirs to whom no specific devise of real estate was made. *Sperry v. Sperry*, 503.

REASONABLE DOUBT.

Instructions. An instruction that defendant was not bound to establish an alibi beyond a reasonable doubt, and if the testimony raised a reasonable doubt that defendant was present at the commission of the crime he was entitled to an acquittal, was not objectionable as leading the jury to believe that it was only such doubt as to the alibi which would necessitate acquittal, where the doctrine of reasonable doubt was correctly stated in another instruction. *State v. Pray*, 248.

Review on appeal. The appellate court will not pass on the question of reasonable doubt in reviewing the evidence, but if the verdict has support and the jury has been properly instructed, its finding on the question is final. *Idem*.

REASSESSMENTS. See SPECIAL ASSESSMENTS.

RECEIVERS

TO

REDEMPTION

RECEIVERS.

Final Report: Setting aside. A receiver is so largely under the direction and control of the district court that an order setting aside a final report and discharge will not be disturbed on appeal unless there is a clear abuse of discretion. *Williams v. Loan Co.*, 22.

Where a notice of hearing on a receiver's final report is signed by no one and addressed to no one, and the order fixing the time of hearing of the report and for service of the notice is not entered of record until after the service is made, there is an entire lack of notice, and the court is without jurisdiction to enter an order of discharge based thereon. *Idem.*

The court may set aside the final report and discharge of a receiver on the petition of any person interested, without requiring other creditors or the original parties to the litigation to be brought in. *Idem.*

Although notice of a receiver's final report and fixing the time of hearing thereon is not required by statute, yet where it is required by an order of court, a discharge procured without compliance may be set aside. *Idem.*

The overruling of a motion to set aside an order discharging a receiver, because not the proper remedy, is not a bar to a petition for the same purpose. *Idem.*

Motion book: Notation of orders. Where a rule of court requires all orders made while in session to be entered on a calendar or motion docket, a receiver should note thereon the filing of his final report, petition for discharge and the order fixing the time of hearing and manner of service. *Idem.*

RECOVERY OF PERSONAL PROPERTY. See **REFLEVIN.**

REDEMPTION.

Mortgage foreclosure: Equity: Accounting. A mortgagor whose property has been sold on foreclosure or his assignee may maintain an equitable action to redeem if brought prior to the expiration of the statutory period of redemption, and where possession has been taken by the holder of the certificate of sale without assent he may have an accounting of the rents and profits and of any portion of the property converted by the certificate holder to his own use, for the purpose of ascertaining the amount required to make redemption. *Dolan v. Blast Furnace Co.*, 254.

Recovery of rents and profits by junior mortgagee. A junior

REDEMPTION Continued

TO

REPLEVIN

mortgagee or his assignee, whose rights have not been foreclosed, may redeem from the foreclosure of a prior mortgage and recover the rents and profits less permanent improvements if any, but such rents must be determined and recovered in the action for redemption and not by a separate suit, unless a sufficient excuse for the failure be shown. *Meredith v. Lochrie*, 596.

REFORMATION OF INSTRUMENTS.

To reform an instrument the proof must be clear, convincing, and satisfactory. *Johnson v. Insurance Co.*, 565.

Insurance: Reformation of policy. Where a provision in a policy for concurrent insurance has been omitted by oversight, equity will reform the contract to correspond with the understanding of the parties. *Dalton v. Insurance Co.*, 377.

Insurance of mortgagee's interest. A mortgagee in possession of personal property has an insurable interest, and where it was the understanding that a policy should be written to cover such interest, but the agent failed to write it in conformity with the agreement, equity will reform and enforce the contract as mutually intended. Evidence reviewed and held sufficient to authorize reformation. *Idem*.

Leases. Where a lessor, in preparing a lease, takes advantage of his tenant's ignorance and confidence in him, and omits a provision authorizing the tenant to remove improvements placed on the premises by him, equity will reform the instrument. *Daly v. Simonson*, 716.

REPLEVIN.

Counterclaim. An independent cause of action cannot be pleaded in a replevin action either as a counterclaim or otherwise as a defense. *Sylvester v. Ammons*, 140.

Instructions. In replevin of a stock of goods taken by a mortgagee in an attempt to foreclose a mortgage given for part of the purchase price, where the only issue submitted was failure of consideration, an inadvertent reference to a claimed fraud in invoicing the goods was without prejudice; and an instruction that if the seller or one in his employ changed the cost price of the goods so as to increase the mortgage debt the plaintiff could recover, was proper. *Idem*.

Recovery for use of property. A defendant in replevin who elects to take a money judgment and proves the value of the property at the time it was taken under the writ, cannot re-

REPLEVIN Continued

TO

RESCISSION

cover for its use from that time. *Colean Implement Co. v. Strong*, 598.

Replevin by mortgagor: Pleadings. In a recovery of personal property claimed to have been wrongfully taken under a mortgage, it is competent to allege and prove that the mortgage was procured by fraud, and that it is without consideration. *Sylvester v. Ammons*, 140.

REPORTS.

Receivers: Final report: Setting aside. A receiver is so largely under the direction and control of the district court that an order setting aside a final report and discharge will not be disturbed on appeal unless there is a clear abuse of discretion. *Williams v. Loan Co.*, 22.

Motion book: Notation of orders. Where a rule of court requires all orders made while in session to be entered on a calendar or motion docket, a receiver should note thereon the filing of his final report, petition for discharge and the order fixing the time of hearing and manner of service. *Idem*.

REPUTATION.

Seduction: Reputation of prosecutrix. On a prosecution for seduction, evidence of the general moral character of the prosecutrix, when she is a witness for the State, is admissible for the purpose of testing her credibility, but should ordinarily be confined to the time of trial. *State v. Haupt*, 152.

RESCISSION.

Actions: Equitable relief. Where a suit in equity by a vendee of real property for specific performance and one at law to rescind the contract are pending at the same time, the court may proceed to determine the material issues in the equity suit regardless of which action was begun first. *Clinton v. Shugart*, 179.

Contracts for sale of land. Where defendants, having only an option to purchase land, agreed to convey it at a specified time under a contract of which time was the essence, and they were unable to procure title on that date, such breach of the contract entitled their purchaser to rescind. *Primm v. Wise & Stern*, 528.

Where time is of the essence of a contract to convey land, plaintiff, to establish his right to rescind for defendant's default must prove that he was ready, able, and willing to per-

RESCISSION Continued

TO

SALES

form his part and made substantial tender of performance on the date specified. *Idem.*

Rescission of contract: Tender. Where defendants were not ready, able, and willing to perform their contract for the conveyance of land at the time specified, and plaintiff tendered a draft for the amount of a cash payment to which no objection was made, and nothing was said regarding a mortgage to be given for deferred payments, such tender was sufficient to support plaintiff's suit to rescind. *Idem.*

Rescission: Tender of performance. Where plaintiff, under a contract to purchase real estate, knew that defendants had no title on the date specified for performance and that they were unable to perform, it was not necessary for him before rescinding to make a technical tender of performance, provided he was ready, able, and willing to perform had defendants been able to do so. *Idem.*

RESTRAINT OF TRADE.

Contracts in restraint of trade. An agreement to refrain from doing a real estate and insurance business in a limited territory and for a valid consideration is enforceable. *Roush v. Gesman Bros. & Grant*, 493.

RIGHT OF WAY. See EMINENT DOMAIN.

ROBBERY. SEE CRIMINAL LAW.

Indictment: Ownership of property. An indictment for robbery which does not allege the ownership of the property, is insufficient. *State v. Wasson*, 320.

SALES.

Breach of contract: Election of remedies. Where the vendor of personal property, after tender and refusal, brought action to recover the contract price, he was not barred on the ground of election of remedies from thereafter amending and asking a recovery of damages for breach of the contract. *Redhead Bros. v. Cattle Co.*, 410.

Chattel mortgages: Inconsistent Provisions: Right to foreclose. The written portions of an instrument will control the printed provisions where the same are inconsistent, so that where it appeared from the terms of a note and chattel mortgage covering a stock of goods, that the mortgagor reserved the right to handle the same in the regular mercantile way and that the indebtedness should be paid from the sales of the

SALES Continued

stock, a printed provision that the mortgagee might take possession whenever he chose, was inoperative. *Sylvester v. Ammons*, 140.

Compliance with contract. The fact that an animal is valuable will not obviate the objection that it is not in compliance with the contract of sale. *Redhead Bros. v. Cattle Co.*, 410.

Under a contract to sell thoroughbred bulls suitable for service, it is competent to show that the tender of a calf of five months was not a compliance. *Idem*.

Cost price. Where a retail dealer sold his entire stock under a contract that the consideration should be based on the cost price, reference was had to the wholesale cost price without regard to the price marked on the goods. *Sylvester v. Ammons*, 140.

Duty of vendor. Where the seller of cattle knew that the purchaser intended them for breeding purposes, he was bound to deliver only such as were suitable for the purpose. *Redhead Bros. v. Cattle Co.*, 410.

Evidence: Hearsay. The testimony of the seller of a stock of goods that he remarked the same upon an explanation of the original cost mark from his vendors, without giving the explanation, was subject to the objection that it was hearsay; and his belief that the goods as finally marked bore the wholesale price was also inadmissible. *Sylvester v. Ammons*, 140.

Evidence of value. In an action for a breach of warranty in the sale of an animal, an inquiry of plaintiff whether he knew the fair market value of the animal had he been as plaintiff thought he was, while improper, is held not reversible error, as it appeared evident that plaintiff understood the question to be predicated upon defendant's representations. *Wingate v. Johnson*, 154.

Fraud: Cost price of goods: Evidence. On an issue as to whether the seller of a stock of goods who was to receive compensation based on the cost price, had fraudulently raised the cost mark on the goods, it was proper to permit a witness of long experience in the mercantile business to state whether the marks on the goods were the original cost mark; and that the stock was old, it appearing that the marks on the goods were fresh. *Sylvester v. Ammons*, 140.

On an issue of fraud in the valuation of a stock of goods, a witness of experience who has familiarized himself with the stock is competent to estimate the difference between the actual

SALES Continued

wholesale cost of the entire stock as inventoried by him, and the inventory as furnished by the seller. *Idem*.

Damages: Market Value. Where the vendor of cattle for breeding purposes, after tender and refusal, elects to retain the same and claims as damages the difference between the contract price and the market value at the time and place of delivery named in the contract, the value of the cattle for beef was not the proper measure of damages, although their delivery was fixed at a time when there was little sale for breeding purposes; but the jury should have been permitted to consider the fact that the season would soon reopen and to look to sales of similar property within a reasonable time of the delivery together with the cost of keeping the animals, in determining their market value. *Redhead Bros. v. Cattle Co.*, 410.

In an action to recover the market value of cattle sold for breeding purposes which were tendered under the contract and refused, the defendant should be permitted to show the price at which plaintiff sold the same within a short time of the tender, as bearing on the question of their market value. *Idem*.

Replevin: Instructions. In replevin of a stock of goods taken by a mortgagee in an attempt to foreclose a mortgage given for part of the purchase price, where the only issue submitted was failure of consideration, an inadvertent reference to a claimed fraud in invoicing the goods was without prejudice; and an instruction that if the seller or one in his employ changed the cost price of the goods so as to increase the mortgage debt the plaintiff could recover, was proper. *Sylvester v. Ammons*, 140.

Tender: Damages: Instructions. Where plaintiff, under a contract to sell defendant a certain number of registered cattle, tendered a lot that were unregistered and therefore refused, and subsequently tendered another lot which were registered but not accepted, whereupon plaintiff brought his action for damages and his testimony as to damage was confined to the registered animals, an instruction permitting the jury to base its finding upon the first tender of which there was no evidence as to damage, was error. *Redhead Bros. v. Cattle Co.*, 410.

Warranty. A representation that an animal is as sure a foal getter as ordinary animals of like character, is a warranty of reasonable service as a foal getter. *Wingate v. Johnson*, 154.
The verdict of \$300.00 damages for a breach of warranty in the sale of a jackass is held not excessive. *Idem*.

SALE OF POISON

TO

SETOFF

SALE OF POISON. *SEE* POISON.**SANITY.**

Nonexpert testimony. The continuation of a rational condition of the mind of one whose acts are put in question, may be shown by the abstract testimony of a nonexpert witness as to such person's sanity. *Lucas v. McDonald & Son*, 678.

SEDUCTION. *SEE* CRIMINAL LAW.

Evidence: Reputation of prosecutrix. On a prosecution for seduction, evidence of the general moral character of the prosecutrix, when she is a witness for the State, is admissible for the purpose of testing her creditability, but should ordinarily be confined to the time of trial. *State v. Haupt*, 152.

SELF-DEFENSE.

Instructions. In a prosecution for murder which is admitted but justified on the ground of self-defense, the defendant is entitled to an instruction that the burden is on the State to show that the act was not in self-defense, especially where the tenor of instructions given were calculated to impress the jury with the idea that it was a defense for the defendant to establish. *State v. Usher*, 287.

SEQUESTRATION OF WITNESSES.

Discretion of court. It was not an unreasonable exercise of discretion to permit the wife of a prosecuting witness to testify, after remaining in the court room during the examination of the other witnesses for the State, in violation of a sequestration order, it appearing that the sheriff did not enforce the order for the reason that she was the only lady witness. *State v. Pray*, 248.

SETOFF.

Subcontractor's claims: Damages. Where a county contracted separately for the construction of two bridges and was sued by a subcontractor who furnished material for both under a single agreement with the contractor and who made but a single statement for the materials furnished and was seeking to enforce its entire claim against the county for an alleged unpaid balance for either or both bridges, the county could offset its entire damages for a breach of both contracts in determining whether there was anything in its hands applicable

SETOFF Continued

TO

SEWERAGE

to the subcontractors' demand. *Modern Steel Structural Co. v. Van Buren County*, 606.

SETTLEMENT.

Burden of proof. The burden of proof on an issue of settlement pleaded in defense to an action for services, is on the defendant. *Barber v. Maden*, 402.

Compromise and settlement: Exclusion of evidence. In an action to recover of an attorney money collected for a client after deducting a stated collection fee, where defendant admitted the service but denied that the collection fee as alleged was agreed upon and pleaded other and prior services performed and full settlement of the entire controversy, it was error to exclude evidence of such other service, and the error was not cured by the indirect appearance in the record of a portion of the excluded testimony. *Greenlee v. Mosnat*, 330.

SEVERABLE CONTRACTS. SEE CONTRACTS

SEWERAGE.

Limitation of indebtedness. The agreement of a city to pay the costs of sewerage from its own funds, where such action would raise the city's indebtedness beyond the constitutional limit, is invalid. *Citizens' Bank of Des Moines v. City of Spencer*, 101.

Reassessment of cost. After a sewerage assessment has been declared invalid and a legislative act intended to cure the assessment has been passed, the city should be given an opportunity to make a reassessment before suit is brought against it on an implied contract to pay for the sewerage. *Idem*.

Unauthorized acts of council. In the absence of a valid ordinance or resolution directing the construction of sewerage, a city council can not make a valid municipal obligation with respect thereto. *Idem*.

Unauthorized contract: Estoppel: Quantum Meruit. One dealing with a municipal corporation is bound to take notice of the statutory limitations upon its power, and the unauthorized act of a city council in contracting for sewerage will not estop the city from denying liability therefor, notwithstanding the implied representations of authority so to do; nor is a *quantum meruit* recovery in such cases authorized. *Idem*.

SHORTHAND REPORTER

TO

SIDEWALKS

SHORTHAND REPORTER.

Compensation. The shorthand reporter of a superior court is entitled to compensation for all of the time he is required to attend court, in the same manner as reporters of the district courts, and his compensation is not restricted to the time he is actually engaged in taking evidence. *Ferguson v. Pottawatamie County*, 108.

SIDEWALKS.

Negligence: Instructions. Where the negligence charged was the improper construction of a sidewalk and the evidence tended to support the allegation, it was not error to refuse an instruction relating to negligence in failing to repair. *Achey v. City of Marion*, 47.

Negligence: Evidence. In an action for injury from an improperly constructed sidewalk, negligence on the part of a city can not be proven by showing a change in the walk subsequent to the injury, yet if such evidence is competent for other purposes, it will not be discredited because incidentally disclosing such change. *Idem*.

Where photographs of the condition of a walk at the time and place of an injury are admissible in evidence, their admission simply for the purpose of illustrating a claim in argument, with a statement of the court that he would so instruct the jury, which he overlooked, was not error. *Considine v. City of Dubuque*, 284.

The owner of a building and his tenants who maintain a cellar-way from a traveled street to the basement, which extends into the street, and who leave the trap door thereto open without railing or guard, are negligent; and the liability of the city for injury therefrom is a question of fact dependent upon all the circumstances. In the instant case all defendants were properly found to be negligent. *Earl v. Cedar Rapids*, 361.

Where plaintiff contended that she did not know of the defect in the walk until after the accident, her belief that she could safely pass over the same was immaterial. *Keim v. Fort Dodge*, 27.

In an action for injury at night from an alleged gutter apron, evidence that the apron was the same as those which were and for a long time prior had been in general use in the city, was admissible as bearing upon plaintiff's knowledge of the same, it appearing that she had been a resident of the city for several years and had used the walks as pedestrians usually do. *Idem*.

SIDEWALKS Continued

TO

SPECIAL ASSESSMENTS

Where it appeared that the city had undertaken to light its streets, but that no light was located at the corner where the accident occurred, and the evidence was conflicting as to whether the lights were burning at the time of the injury, it was competent for plaintiff to show that the lamps were burning and did not give sufficient light at the place of accident to disclose the defective character of the walk. *Idem*.

Where the defendant in an action for a sidewalk injury introduced photographs of the place of accident, it was competent for plaintiff on rebuttal to show changes in the walk between the time of the accident and the taking of the photographs. *Achey v. City of Marion*, 47.

Contributory negligence: Evidence. Although a pedestrian may not pass along a sidewalk utterly heedless of danger, yet failure to anticipate an unusual danger is not contributory negligence as a matter of law. Under the evidence plaintiff's negligence was properly submitted to the jury. *Kaiser v. Hahn Bros.*, 561.

One is not guilty of contributory negligence as a matter of law in passing over a defective walk rather than taking another way, where the defect was not known to him. *Considine v. City of Dubuque*, 284.

Proximate cause. Where plaintiff was injured from a fall due to an alleged defective sidewalk and subsequently sustained other injuries from a fall on another street, due to the negligence of the city in failing to keep the walk clear of snow and ice, it is held that the relation of the alleged negligence of the city causing the first injury to the latter accident, was not such as to constitute the former the natural and proximate cause of the latter. *Watters v. Waterloo*, 199.

SPECIAL ASSESSMENTS.

Benefits: Laches. Where a municipal assessment for grading a street is wholly void, the property owner is not liable for benefits conferred; nor will delay in suing to quiet title against the assessment constitute a defense to that action. *Carter v. Cemansky*, 506.

Estoppel. The payment of an installment of a void assessment by one under whom plaintiff claims title, will not estop him from contesting the validity of the tax; nor will the fact that plaintiff's remote grantor took title "subject to all incumbrances of record" operate as an estoppel against him. *Idem*.

Notice: Repeal of statutes. The repeal of a statute by impli-

SPECIAL ASSESSMENTS Continued

cation is not favored in law, and where two statutes covering in whole or in part the same subject are not absolutely irreconcilable, and a purpose of repeal is not clearly expressed or indicated, effect if possible will be given to both. Under this rule, Code, section 971, relative to notices in cases of special assessments is not repealed and section 823 substituted therefor by chapter 29, Acts Twenty-eighth General Assembly, but the former is applicable to cities under special charter, and the latter to cities organized under the general law. *Diver v. Savings Bank*, 691.

Where the published notice of a street improvement does not correspond with the ordinance and resolution, or the notice for proposals for bids does not cover the existing situation, an assessment of abutting property for the cost is void. *Gallaher v. Garland*, 206.

Objection to assessment. A property owner is not required to appear before the city council and object to a municipal assessment for an unauthorized improvement in order that he may contest the validity of an alleged tax based thereon. *Carter v. Cemansky*, 506.

Where an assessment is void, failure to object to the proceeding before the city council will not preclude a suit to restrain collection thereof. *Gallaher v. Garland*, 206.

Ordinances. Where an ordinance authorizing an assessment of abutting property to pay street improvements is wholly void, and no valid reassessment thus ordered can be made, a subsequent ordinance providing a legal method will not sustain the prior proceedings. *Martin v. Oskaloosa*, 680.

Power to levy special assessments. Where a statute conferring upon a city the power to make special assessments for improvement purposes points out the method to be pursued, the adoption of an ordinance for that purpose is not necessary. Under this rule a city had power to assess the cost of street improvements to abutting property pursuant to statutory provisions substantially as contained in chapter seven, title five, of the Code, and the validity of the ordinance under which it purported to act was immaterial except so far as inconsistent with the statute. *Idem*.

Quieting title. Where a municipal assessment is void, the plaintiff in an action to quiet title against a tax sale thereunder is not required, as a condition precedent to his right of action, to offer to pay that part of the tax which may be found valid;

SPECIAL ASSESSMENTS Continued TO SPECIFIC PERFORMANCE

it will be sufficient if this is done when a right is asserted under the certificate of sale. *Carter v. Cemansky*, 506.

Reassessments. Where a city had authority to levy a special assessment, it may make a reassessment because of an irregularity, under Code, section 836. *Martin v. Oskaloosa*, 680.

Tender. Where an assessment is void or where it does not appear what portion of the same might have been legally assessed, a tender thereof is not required to maintain a suit to restrain the collection. *Gallaher v. Garland*, 206.

Validity of assessment. Where a city has authority only to gravel a street at the expense of abutting property, and in connection therewith incurs and assesses against the property an expense for grading, which is unnecessary for the purpose of graveling and there is no way of separating such expense, the assessment is void *in toto*. *Idem*.

Waiver of objection. A property owner who has no knowledge that the cost of grading a street is to be assessed against his property does not waive objection thereto by failing to protest as the work goes on. *Idem*.

SPECIAL INTERROGATIVES.

It was error to submit a special interrogatory as to whether defendant guaranteed the quantity of land conveyed, where the real issue was whether defendant had made such representations that plaintiff had the right to rely thereon as a warranty. *Boddy v. Henry*, 31.

Special interrogatories in the nature of a cross-examination of the jury should be refused. *Greenlee v. Mosnat*, 330.

Inaccurate answers to special interrogatories not calling for ultimate facts, nor for facts of such importance that a finding thereon against the weight of the testimony is necessarily indicative of passion, do not constitute ground for setting aside the general verdict. *Kuehl v. Railway Co.*, 638.

SPECIFIC PERFORMANCE.

Actions: Equitable relief. Where a suit in equity by a vendee of real property for specific performance and one at law to rescind the contract are pending at the same time, the court may proceed to determine the material issues in the equity suit regardless of which action was begun first. *Clinton v. Shugart*, 179.

Breach of contract: Damages. The purchaser of a minor's interest in real property under a contract with the guardian,

SPECIFIC PERFORMANCE Continued

having knowledge of the minority and the necessity of an order of court to make the conveyance, cannot, on the dismissal by the court of an application for such order, recover substantial damage for loss of profits in an action for specific performance. *Eggert v. Pratt*, 727.

Contract of employment: Breach: Remedy. A contract of employment for personal services to be performed in the future, is not the subject for an action for specific performance, but the remedy in case of breach is a law action for damages. *Wood & Duvall v. Association*, 464.

Contract for the sale of land. Where a written contract for the sale of real estate, states that the persons executing the same are acting as agents for the owner who afterwards in writing accepts the contract as his own, it becomes in legal effect an agreement between the purchaser and owner. *Findley v. Koch*, 131.

Damages. A purchaser of land who is not entitled to specific performance of the contract because of his lack of diligence in asserting his rights thereunder, is not entitled to damages for the vendor's refusal to convey, after the lapse of a reasonable time. *Idem*.

Decree: Election of remedies. In a suit by the purchaser for specific performance of a contract to convey land, the defendant is not entitled to a decree authorizing him to elect whether he will return the amount paid on the purchase price or accept the balance due and deliver the deed, where time was not the essence of the contract or where he had taken no steps to declare a forfeiture, and especially when such relief was not asked by pleading or otherwise. *Rea v. Ferguson*, 704.

Delay. Unreasonable delay in insisting on performance, and negligence in carrying out the contract, will defeat specific performance, although time is not specifically made the essence of the contract. *Findley v. Koch*, 131.

Evidence. In an action for specific performance of a contract to convey land, the evidence is reviewed upon which it is held that by plaintiff's neglect to carry out the contract they had forfeited the right to specific performance and damages. *Idem*.

When denied: Evidence. Equity requires of a purchaser of land the utmost good faith on his part in attempting to carry out the contract, before specific performance will be decreed at his suit, and if his delay renders performance inequitable or unjust to the seller it will be denied. Evidence held to show

SPECIFIC PERFORMANCE Continued

TO

STATUTES

such delay and inaction on the part of the purchaser as to justify a refusal of specific performance. *Idem.*

Jurisdiction. The courts of this State have jurisdiction to decree specific performance of a contract for the sale of land situated in another State, where the parties to the action are residents of Iowa. *Rea v. Ferguson*, 704.

Parties. Where a deed to real property pursuant to a contract of sale was deposited with a bank in escrow, the bank was a proper party to an action for specific performance of the contract where delivery of the deed was part of the relief asked, and especially where the bank had taken a mortgage upon the property subsequent to the execution of the contract. *Idem.*

Recovery of purchase money. A recovery of earnest money by a purchaser of land who has lost his rights under the contract, cannot be had in a suit for specific performance by way of damages. *Findley v. Koch*, 131.

Tender. Where it is the duty of the vendor in an executory contract to convey land, to pay the taxes accruing to the time of the conveyance and he fails so to do, a tender of the purchase price at the maturity of the contract, less the amount of such tax, will support an action for specific performance at the suit of the vendee. *Clinton v. Shugart*, 179.

STATUTE OF FRAUDS.

Express trust. An express trust arising from placing the title to real property in a son for the benefit of the father can only be established by documentary evidence. *Hoon v. Hoon*, 391.

STATUTES.

Bankruptcy: Rights of creditors. The amendment of 1903, by which the four months' clause of the bankruptcy act is made to count from the date of the recording of the instrument rather than its execution and delivery, is not retroactive, nor does it affect previous constructions of the statute, but limits the time within which proceedings may be instituted. *Murphy v. Murphy*, 57.

The provision of the bankruptcy act that "claims, which for want of record or other reasons would not have been valid liens against creditors of the bankrupt, shall not be liens against his estate," refers to the validity of liens under the State law; and a creditor existing when a mortgage is executed must have acquired a lien on the mortgaged property, by attachment or otherwise, prior to notice of the mortgage to

STATUTES Continued

entitle him to question its validity; but a subsequent creditor may attack it on the ground that he was fraudulently induced to extend credit. *Idem*.

Change of venue. It is error for a justice to grant a change of venue after the determination of a motion to strike from the answer and to make it more specific, as the same constitutes a commencement of the trial within the meaning of Code, section 4502; and the error is not waived by proceeding to trial. *Columbus Junction Tel. Co. v. Overholt*, 579.

Codification: Statutory construction. A general recodification and re-enactment of the statute law does not indicate a legislative intent to change the same, and the decisions relating to statutory provisions then in force will continue controlling in the interpretation of the same provisions; but where it is the plain legislative intent to radically change or materially add to the previous statutes, such decisions are not controlling. *Martin v. Oskaloosa*, 680.

Constitutional law: Classification: Uniformity: Due process of law. The act of the legislature limiting the time within which actions should be commenced to enforce all judgments rendered between the taking effect of the Code of 1873 and the Code of 1897, is not unconstitutional for nonuniformity, as it applies to all such judgments as a class, and the act simply recognizes a classification made by prior legislation; nor is it void as depriving the judgment holder of rights without due process of law. *Wooster v. Bateman*, 552.

Contempt. The provisions of the statute prescribing the procedure for the punishment of constructive contempts are not unconstitutional as depriving courts of their inherent power to punish contempt, but rather provide regulations for the exercise thereof; nor do they deprive the accused of any constitutional right or punish him without due process of law. *Drady v. District Court*, 345.

The statutes defining contempts and prescribing the procedure for their punishment, cover the whole of the subject-matter, and therefore operate to repeal the common law on the subject. *Idem*.

Contract of employment: Termination by legislative enactment. A contract for personal services entered into with a building and loan association providing for compensation from a specified fund, which contemplates a possible change in the law rendering the creation of such a fund and payment of services therefrom illegal, is terminated by a subsequent legislative

STATUTES Continued

act to that effect, thus rendering performance impossible. *Wood & Duvall v. Association*, 464.

Damages: Apportionment. Under Code, section 2340, where more than one dog was engaged in killing sheep, the owner of each is liable only for the damage done by his dog, and the amount of damage and an apportionment thereof is for the jury to determine. *Anderson v. Halverson*, 125.

Embezzlement: Value of property. In a prosecution for embezzlement under Code, section 4842, it is essential to find the value of the property embezzled, the same as in larceny, to determine the punishment. *State v. Carmean*, 291.

Division fences: Partition. There are but two methods of dividing partition fences, one by order of the fence viewers, and the other by written agreement as provided by Code, sections 2356 and 2361; and a division based on a mere understanding of one landowner with the tenants of the other is of no effect. *De Mers v. Rohan*, 488.

Insurance: Waiver of conditions: Authority of local agent. Code, section 1750, providing that any officer, agent or other representative of an insurance company who may solicit insurance or transact the business generally of such company shall be held to be an agent with authority to transact all business within the scope of his employment, prohibits any limitations upon the authority of an agent having the powers enumerated in said section to transact all business within the apparent scope or usual extent of his employment; and under this section a local agent may waive the conditions of a policy and consent to an incumbrance upon the property. *Liquid Carbonic Acid Mfg. Co. v. Insurance Co.*, 225.

Under Code, section 1743, the failure of an insured to keep a set of books, or the violation of an iron safe clause, will not defeat recovery where there is neither pleading nor proof that such neglect contributed to the loss. *Johnson v. Insurance Co.*, 565.

Transaction of business of foreign companies. Issuance and delivery of a fire policy by a foreign insurance company, covering property in this State, constitute the transaction of business in the State within the meaning of the statutes regulating the insurance business. *Hartman & Daniels v. Hollowell*, 643.

Judgments: Effect of transcript. The filing of the transcript of a judgment in district court makes it a judgment of that court under Code, section 273, simply for the purpose of enforcement. *Klepfer v. City of Keokuk*, 592.

STATUTES Continued

Limitations: Amendment: Reasonable time. In determining whether the time allowed by a statute shortening the period of limitation for the commencement of action to enforce a right is reasonable, the time intervening between the passage of an amendment and the date it takes effect should be considered. In the instant case fifteen months so allowed in which actions might be brought on judgments otherwise barred by the amendment, is held reasonable. *Wooster v. Bateman*, 552.

The legislature may amend an existing statute so as to lengthen or shorten the time within which a cause of action on a judgment will be barred, without violating the constitutional prohibition against the impairment of contracts, if a reasonable time is given for the commencement of action before the bar becomes effectual. *Idem*.

Paving contract: Validity: Interest of councilman. After a municipal improvement has been made and accepted by the city, a taxpayer, in the absence of actual fraud, cannot resist payment therefor because of a violation of Code, section 943, prohibiting a member of the council from being interested in any contract for such work. *Diver v. Savings Bank*, 691.

Reassessments of property. Where a city had authority to levy a special assessment, it may make a reassessment because of an irregularity, under Code, section 836. *Martin v. Oskaloosa*, 680.

Repeal of statutes. The repeal of a statute by implication is not favored in law, and where two statutes covering in whole or in part the same subject are not absolutely irreconcilable and a purpose of repeal is not clearly expressed or indicated, effect if possible will be given to both. Under this rule, Code, section 971, relative to notices in cases of special assessments is not repealed and section 823 substituted therefor by chapter 29, Acts Twenty-eighth General Assembly, but the former is applicable to cities under special charter, and the latter to cities organized under the general law. *Diver v. Savings Bank*, 691.

Under Code, section 751, the vacation of a street by a city does not revert the title thereto in the abutting owner, but it remains in the city and may be disposed of for other purposes. *Idem*.

Streets: Vacation. The provisions of an ordinance intended to vacate portions of certain streets are construed and held sufficient to effect that purpose, although providing that upon

STATUTES Continued

TO

STREETS

abandonment by the company, the title shall revest in the city.
Idem.

Swamp lands: Use of proceeds. A county may use the proceeds arising from the sale of swamp lands granted to it by the swamp land act of 1850 in the construction of roads through the swamp land district, without submitting the question to a vote of the people, notwithstanding the subsequent act of 1858 which is held to require such submission in case roads are to be constructed outside the swamp land district. *Nelson v. Harrison County*, 436.

STATUTORY CONSTRUCTION. See **STATUTES**.

STREETS.

Assessments. Where a city has authority only to gravel a street at the expense of abutting property, and in connection therewith incurs and assesses against the property an expense for grading, which is unnecessary for the purpose of graveling and there is no way of separating such expense, the assessment is void *in toto*. *Gallaher v. Garland*, 206.

Damages. Where a railroad embankment obstructs a street affording access to business property which has not been vacated, the owner is entitled to damages for depreciation in the value of his property caused thereby. *Harrington v. Railway Co.*, 388.

Negligence: Liability of city. A city is liable for an injury resulting from the negligent maintenance of a private cellar way which extends into a traveled street, whether the injury results from an approach from the street or the abutting property. *Earl v. Cedar Rapids*, 361.

A town is liable for the injury to a horse though running at large, caused by a defective street negligently permitted to remain out of repair. *Nocks v. Town of Whiting*, 405.

Contributory negligence. A pedestrian is not required to be on the lookout for hidden dangers in the street: He is only required to walk with his eyes open observing his natural course, and in the usual manner. A finding of ordinary care is sustained. *Earl v. Cedar Rapids*, 361.

In an action against a city for injuries to a pedestrian caused by an excavation in the street, the evidence as to plaintiff's contributory negligence is reviewed and held to present a question of fact for the jury, whose finding will not be disturbed. *Bus-sell v. City of Fort Dodge*, 308.

STREETS Continued

TO

SUBCONTRACTORS

Where the uncontradicted testimony of a pedestrian was that he did not know of an excavation in the street until he fell into it, he was not guilty of contributory negligence in imprudently attempting to pass over it, although there was another safe and convenient way. *Idem*.

Vacation of streets and public grounds. Under Code, section 751, the vacation of a street by a city does not revest the title thereto in the abutting owner, but it remains in the city and may be disposed of for other purposes. *Harrington v. Railway Co.*, 388.

The provisions of an ordinance intended to vacate portions of certain streets are construed and held sufficient to effect that purpose, although providing that upon abandonment by the company, the title shall revest in the city. *Idem*.

A city has power to vacate public grounds, and where all property owners are affected alike by its exercise, though in different degrees, there is no remedy; but where an abutting owner sustains an injury peculiar to his property by the vacation of public ground used as an ingress and egress thereto he is entitled to damages. *Borghart v. Cedar Rapids*, 313.

STREET RAILWAYS.

Negligence: Instructions. In an action for injuries resulting from collision with a street car, instructions directing a verdict for defendant if plaintiff failed to show freedom from contributory negligence, and enumerating the acts of negligence relied upon, except failure of the motorman to stop the car after he saw plaintiff's peril, and further charging that if the jury failed to find any of the acts of negligence, their verdict should be for defendant, were inconsistent with another charge that, though plaintiff was negligent yet defendant would be liable if its employes saw plaintiff and knew of his peril and failed to use ordinary care to prevent the injury. *Christy v. Stedman*, 428.

SUBCONTRACTORS.

Liability of county for subcontractor's claims. Where a county has not reserved the right to pay the claim against a contractor employed to construct bridges, and a subcontractor has failed to file the statement of his demand as provided by Code, section 3102, the county may rightfully pay the contractor according to the terms of the contract, without inquiring as to

SUBCONTRACTORS Continued

TO

SURETIES

materials furnished by subcontractors. *Modern Steel Structural Co. v. Van Buren County*, 606.

A subcontractor who furnishes material for the construction of county bridges under an agreement with the principal contractor alone, is charged with notice of the terms and conditions of the principal contract, and his rights are limited thereby; and where the county has lawfully discharged its obligation to the contractor prior to notice of the subcontractor's claim, or where the contract is void for fraud, the subcontractor has no recourse against the county. *Idem*.

Where a county contracted separately for the construction of two bridges and was sued by a subcontractor who furnished material for both under a single agreement with the contractor and who made but a single statement for the materials furnished and was seeking to enforce its entire claim against the county for an alleged unpaid balance for either or both bridges, the county could offset its entire damages for a breach of both contracts in determining whether there was anything in its hands applicable to the subcontractor's demand. *Idem*.

Mechanic's liens: Essentials: Furnishing material. For a materialman to avail himself of the subcontractor's lien, he must have actually furnished the material for the particular building upon which the lien is claimed, independent of representations of the contractor; but it is not essential that the materials furnished were actually used in the building. *Hobson Bros. v. Townsend*, 453.

SURETIES.

Mulct tax: Liability of sureties. The sureties on a saloon keeper's bond are liable for the payment of the mulct tax. *O'Brien County v. Mahon*, 539.

The sureties on a liquor dealer's bond cannot escape liability for the mulct tax on the ground that by failure of the principal to pay the tax he is no longer operating under the law. *Idem*.

Mere failure to collect a mulct tax when due will not discharge the sureties on a liquor dealer's bond. *Idem*.

The sureties on a liquor dealer's bond are liable for the full tax for the quarter in which the obligation arose. *Idem*.

Failure of a liquor dealer's bond to describe the place where the business is to be conducted, will not invalidate the bond. *Idem*.

SURETIES Continued

TO

TAXATION

A county may recover from the sureties on a liquor dealer's bond without first exhausting the property of the principal. *Idem.*

SWAMP LAND.

Use of proceeds: Statutes. A county may use the proceeds arising from the sale of swamp lands granted to it by the swamp land act of 1850, in the construction of roads through the swamp land district, without submitting the question to a vote of the people, notwithstanding the subsequent act of 1858 which is held to require such submission in case roads are to be constructed outside the swamp land district. *Nelson v. Harrison County*, 436.

TAXATION.

Appeal. The issue on appeal from an assessment of omitted property is the correctness of the action of the taxing officer and the evidence must be confined to that issue, but the taxpayer is entitled to have every question determined anew which such officer was called upon to determine. *Schoonover v. Petcina*, 261.

Where an assessment of omitted property has been made and an appeal taken, it becomes the duty of the court to inquire into and determine *de novo* from all the evidence the liability for the assessment; and an unverified statement of omitted taxes prepared by agents of the county employed to discover the same and the assessment thereof, does not make a *prima facie* case for the county requiring the taxpayer to show what specific items were erroneously listed. *Idem.*

Assessment in wrong district: Reassessment. Moneys and credits should be listed and assessed to the owner in the district in which he resides, although in the possession of agents residing elsewhere, but when the property has been listed in good faith by such agents in another township of the same county and the tax levied thereon paid, the county cannot collect back taxes thereon for the same year in the district of the owner's residence, without offering to return the tax previously paid. *Snakenberg v. Stein*, 650.

The assessment and payment of taxes in the wrong county will not preclude taxation of the property for the same year in the county of the owner's residence, and the collection thereof as omitted taxes. *Idem.*

Listing of omitted property. The county treasurer need not list

TAXATION Continued

omitted property for taxation on the day specified in the notice to the taxpayer to appear and show cause why the same should not be listed and taxed, but may do so within a reasonable time thereafter. *Idem*.

Notice of delinquent taxes. A notice to a taxpayer pursuant to Code, sections 1374 and 1385, relative to the assessment of omitted property, is not libelous in the absence of any charge of fraud on the part of the taxpayer withholding the same. *O'Connell v. Shontz*, 709.

Objection to assessment: Sufficiency. No formal pleadings are required in a proceeding to assess omitted property, and a taxpayer's general objection to an assessment, made before the treasurer, that the items of moneys and credits proposed to be assessed were not items for which he was liable for the years specified, and that his indebtedness for those years which he was entitled to set off against the same was equal to the amount of his moneys and credits, was sufficiently specific to raise the issue on appeal. *Schoonover v. Petcina*, 261.

A property owner is not required to appear before the city council and object to a municipal assessment for an unauthorized improvement in order that he may contest the validity of an alleged tax based thereon. *Carter v. Cemansky*, 506.

Omitted property. Notice of assessment. Notice to a taxpayer of the proposed assessment of omitted property must be given within five years from the date at which the same should have been assessed, or the same will be barred by the statute. *Schoonover v. Petcina*, 261.

Bank securities. Where the owner of a private banking business sold and transferred the business and assets to a national bank of which he became a stockholder, and its president, the notes and other evidences of indebtedness so transferred became the property of the national bank from the time of the transfer, and were no longer taxable to the assignor. *Idem*.

Where the assessment rolls inform a taxpayer that he need only list such liabilities as he desires to offset against his moneys and credits, he is not estopped in a proceeding to assess omitted property, from making an itemized statement of his indebtedness for each year, for the purpose of showing a larger amount than contained in the assessment rolls. *Idem*.

Where the president of a national bank loaned bank money on real estate security in his own name, thereafter assigning the notes only to the bank, the mortgages securing the same were not taxable to such president as moneys and credits; nor was

TAXATION Continued

he estopped from claiming that the same were bank property because the transaction amounted to an evasion of the federal banking law. *Idem*.

Contracts: What constitutes a credit. Where one purchases land, paying therefor and taking title in his own name, and in accordance with a previous understanding enters into a contract of lease for a rental based upon an interest rate on his investment, giving to the lessee an option to purchase the same within a specified time upon payment of its cost to the lessor, the transaction does not amount to a contract giving rise to any actual indebtedness which is assessable as a credit. *Idem*.

Credits. The deferred payments due on a mutually obligatory contract for the sale of land are taxable as a credit under Code, section 1308. *Cross v. Snakenberg*, 636.

The provisions of an executory contract for the sale of land are considered, and it is held that there is nothing to indicate an understanding of the parties that the purchaser should pay the taxes falling due prior to a conveyance of the title. *Clinton v. Shugart*, 179.

As between the parties of an executory contract for the sale of land, where the vendor retains the possession, rents and profits until the conveyance is due, he is liable for the payment of accruing taxes in the absence of an agreement by which the purchaser assumes that obligation; and this rule is not affected by Code, section 1400. *Idem*.

Deduction of debts: What constitutes a debt. An obligation which a taxpayer may deduct from the amount of his moneys and credits under Code, section 1311, must be an actual indebtedness; and notes signed simply as an endorser which were so reported to the comptroller of currency by such endorser, do not constitute such indebtedness. *Schoonover v. Petcina*, 261.

Quieting title. Where a municipal assessment is void, the plaintiff in an action to quiet title against a tax sale thereunder is not required, as a condition precedent to his right of action, to offer to pay that part of the tax which may be found valid; it will be sufficient if this is done when a right is asserted under the certificate of sale. *Carter v. Cemansky*, 506.

Specific performance: Tender. Where it is the duty of the vendor in an executory contract to convey land to pay the taxes accruing to the time of the conveyance and he fails so to do, a tender of the purchase price at the maturity of the contract, less the amount of such tax, will support an action for

TAXATION Continued

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specific performance at the suit of the vendee. *Clinton v. Shugart*, 179.

TAXATION OF COSTS. See **COSTS**.

TAXES. See **TAXATION**.

TELEPHONES.

Assumption of risk. A telephone lineman not an inspector of wires, nor charged with the duty of inspecting or testing live wires, does not assume the risk of an injury resulting from a defective light wire. *Barto v. Telephone Co.*, 241.

Negligence. A telephone company permitting the use of its poles for carrying electric light wires, must use a degree of care for the protection of its employes commensurate with the danger involved. *Idem*.

A telephone company which acquiesces in the use of its poles by an electric company, is charged with the duty of seeing to it that the light wires do not expose its employes to unusual danger. *Idem*.

In an action by a telephone lineman for injuries caused by a defective electric light wire carried on the poles of the telephone company, the evidence is reviewed and held to justify a submission to the jury of the issue of defendant's negligence. *Idem*.

Contributory negligence. A telephone lineman was injured by coming in contact with a defectively insulated electric light wire which the defendant carried on its poles; under the evidence it is held that the question of the lineman's contributory negligence was properly submitted to the jury. *Idem*.

Negligence of fellow servant. In an action for the death of an employe of a telephone company caused by his coming in contact with a wire charged with electricity, through the negligence of a fellow servant sent to repair the wire, the evidence is reviewed and held to sustain a finding that the fellow servant was incompetent, and that defendant had knowledge thereof. *Scott v. Telephone Co.*, 524.

TENDER.

Damages: Instructions. Where plaintiff, under a contract to sell defendant a certain number of registered cattle, tendered a lot that were unregistered and therefore refused, and subsequently tendered another lot which were registered but not accepted, whereupon plaintiff brought his action for damages and his testimony as to damage was confined to the registered

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TO

TITLE

animals, an instruction permitting the jury to base its finding upon the first tender of which there was no evidence as to damage, was error. *Redhead Bros. v. Cattle Co.*, 410.

Duty of vendor. Where the seller of cattle knew that the purchaser intended them for breeding purposes, he was bound to deliver only such as were suitable for the purpose. *Idem*.

Evidence. Under a contract to sell thoroughbred bulls suitable for service, it is competent to show that the tender of a calf of five months was not a compliance. *Idem*.

Rescissions: Tender of performance. Where plaintiff, under a contract to purchase real estate, knew that defendants had no title on the date specified for performance and that they were unable to perform, it was not necessary for him before rescinding to make a technical tender of performance, provided he was ready, able, and willing to perform had defendants been able to do so. *Primm v. Wise & Stern*, 528.

Where time is of the essence of a contract to convey land, plaintiff, to establish his right to rescind for defendant's default, must prove that he was ready, able, and willing to perform his part and make substantial tender of performance on the date specified. *Idem*.

Where defendants were not ready, able, and willing to perform their contract for the conveyance of land at the time specified, and plaintiff tendered a draft for the amount of a cash payment to which no objection was made, and nothing was said regarding a mortgage to be given for deferred payments, such tender was sufficient to support plaintiff's suit to rescind. *Idem*.

Special assessments. Where an assessment is void or where it does not appear what portion of the same might have been legally assessed, a tender thereof is not required to maintain a suit to restrain the collection. *Gallaher v. Garland*, 206.

Specific performance. Where it is the duty of the vendor in an executory contract to convey land, to pay the taxes accruing to the time of the conveyance and he fails so to do, a tender of the purchase price at the maturity of the contract, less the amount of such tax, will support an action for specific performance at the suit of the vendee. *Clinton v. Shugart*, 179.

TITLE.

Rescission: Curing defective title. A contract providing that vendors shall have a reasonable time after tender of an abstract to remedy defects in the title, does not contemplate a complete

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TO

TRIAL BY JURY

absence of title and delay for the purpose of procuring the same. *Primm v. Wise & Stern*, 528.

TRANSACTIONS WITH DECEDENTS.

Qualification of wife as witness. A wife is not disqualified by Code, section 4604, as a witness to a transaction and communication between her husband and a party since deceased, in which she took no part but was a mere spectator. *Lucas v. McDonald & Son*, 678.

TRANSCRIPTS.

Judgments: Effect of transcript. The filing of the transcript of a judgment in district court makes it a judgment of that court under Code, section 273, simply for the purpose of enforcement. *Klepfer v. City of Keokuk*, 592.

TRESPASS.

Liability of railway company. The liability of a railway company for the death of a trespasser upon its tracks, is not dependent upon the willful and wanton act of the trainmen, but a failure to exercise the highest possible degree of care to avoid the accident after the peril is discovered, will fix its liability. *Gregory v. Railway Co.*, 230.

Licensees. Where the employes of a packing house company have for years, with the knowledge of the railway company, been accustomed to cross its switch tracks in passing from one building to another about their work, and the railway company has offered no objection or obstruction to such use, it will be held to have consented thereto, and one of such employes killed while so crossing its tracks was not a trespasser but a licensee. *Booth v. Railway Co.*, 8.

Trespassing animals: Liability of owner. Where there has been no legal partition of a division fence, the owner of cattle which escape onto adjoining land is liable for the damage done by them. *De Mers v. Rohan*, 488.

TRIAL BY JURY.

Criminal law: Waiver of right. The right of a trial by jury is a constitutional guaranty which cannot be waived by a defendant in a criminal case, and a judgment entered on a trial to the court will be reversed on appeal. *State v. Rea*, 65.

A defendant may waive a jury on the trial of an appeal from a conviction before a mayor for the violation of an ordinance. *Town of Lovilia v. Cobb*, 557.

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TRUSTS

TRIAL DE NOVO.

Appeal from assessment: Issues. The issue on appeal from an assessment of omitted property is the correctness of the action of the taxing officer and the evidence must be confined to that issue, but the taxpayer is entitled to have every question determined anew which such officer was called upon to determine. *Schoonover v. Petcina*, 261.

Where an assessment of omitted property has been made and an appeal taken, it becomes the duty of the court to inquire into and determine *de novo* from all the evidence the liability for the assessment; and an unverified statement of omitted taxes prepared by agents of the county, employed to discover the same and the assessment thereof, does not make a *prima facie* case for the county requiring the taxpayer to show that specific items were erroneously listed. *Idem*.

Although a case is triable *de novo* on appeal, in view of the opportunity of the trial judge to observe the demeanor of the witnesses, his findings will be disturbed with reluctance. *Johnson v. Insurance Co.*, 565.

TRUSTS.

Express trust. An express trust arising from placing the title to real property in a son for the benefit of the father can only be established by documentary evidence. *Hoon v. Hoon*, 391.

Husband and wife. Where a wife turned her own money over to her husband, who gave his notes therefor and used the same as his own, it could not be regarded as held in trust by him in the absence of a showing that he agreed to so hold it for her. In re Estate of Deaner, 701.

Parol evidence of trust. A deed reciting a consideration cannot be shown by parol to be a trust. *Byerly v. Sherman*, 447.

A deed absolute on its face and reciting a consideration cannot, in the absence of fraud, be shown by parol to be in trust for the grantor. *Ostenson v. Severson*, 197.

Parent and child. Where a father having the confidences of his children who are members of his family, by promises which he did not intend to perform induced them to convey to him their interest in land, a court of equity will decree a constructive trust in their favor. *Gregory v. Bowlsby*, 588.

The mere relationship of a parent and adult child will not constitute such a state of confidence as to raise a presumption of fraud, but it will be considered in connection with other facts

TRUSTS Continued

TO

VENDOR AND VENDEE

and circumstances for the purpose of establishing a trust.
Idem.

As between parent and child a conveyance of real property is presumed to be an advancement, but this presumption may be overcome by clear and satisfactory proof showing a trust; but to admit proof of a trust the facts relied upon must be pleaded.
Hoon v. Hoon, 391.

Resulting trust. A mere verbal agreement whereby defendant was to purchase a tract of land in his own name and with his own funds to be resold and the profits above cost to be the joint property of plaintiffs and defendant, and to the purchase of which plaintiffs contributed nothing, gave them no right or interest in the land; nor was defendant's relation to the claimed partnership shown to have been such as to raise a trust in favor of plaintiffs. *Forrest v. O'Bryan*, 571.

UNDUE INFLUENCE. See FRAUDULENT CONVEYANCES.

UNLAWFUL COMBINATIONS.

Fraud: Evidence. In an action for damages based on the contention that defendants entered into an unlawful combination to hinder and delay plaintiff in the collection of a judgment against another, the evidence is considered and held insufficient to show a fraudulent concealment of the judgment debtor's property. *Pieter v. Bales*, 170.

VACATION OF PUBLIC GROUNDS.

Damage to abutting owner. A city has power to vacate public grounds, and where all property owners are affected alike by its exercise, though in different degrees, there is no remedy; but where an abutting owner sustains an injury peculiar to his property by the vacation of public ground used as an ingress and egress thereto he is entitled to damages. *Borghart v. Cedar Rapids*, 313.

VENDOR AND VENDEE.

Damages. A purchaser of land who is not entitled to specific performance of the contract because of his lack of diligence in asserting his rights thereunder, is not entitled to damages for the vendor's refusal to convey, after the lapse of a reasonable time. *Findley v. Koch*, 131.

False representations: Reliance upon. A purchaser of land may rely upon the vendor's representations as to the quantity, even though he makes a personal inspection, not amounting to an

VENDOR AND VENDEE Continued

TO

VERDICT

investigation to satisfy himself, from sources independent of the vendor and his agents. *Boddy v. Henry*, 31.

Qualified statement as to quantity. Where a vendor represented the tract conveyed to contain "about" 17,000 acres when there was in fact but 15,300, such qualification did not defeat the vendee's right to damages for the false statement. *Idem.*

Recovery of purchase money. A recovery of earnest money by a purchaser of land who has lost his rights under the contract, cannot be had in a suit for specific performance by way of damages. *Findley v. Koch*, 131.

Vendor's Lien. A grantor claiming that his conveyance was voluntary and without any agreement with the grantee, cannot have a vendor's lien for the price. *Ostenson v. Severson*, 197.

VENUE.

Instructions. Where the venue is clearly proven and the necessity of proving the same is stated in an instruction relating to an included offense, the failure to so instruct in connection with the higher offense charged, is not error. *State v. Icenbice*, 16.

VERDICT.

An appeal does not lie from an order refusing to direct a verdict in favor of a cross defendant, as to whom there had been no trial. *Bussell v. City of Fort Dodge*, 308.

A motion to direct a verdict will only be reviewed on the grounds on which it was submitted in the trial court. *Earl v. Cedar Rapids*, 361.

Reduction of verdict. It is error for a trial court to reduce a verdict and enter judgment without giving the party against whom it is to be entered the option of accepting the same or submitting to a new trial. *Barber v. Maden*, 402.

The verdict of \$300.00 damages for a breach of warranty in the sale of a jackass is held not excessive. *Wingate v. Johnson*, 154.

Special interrogatories. Inaccurate answers to special interrogatories not calling for ultimate facts, nor for facts of such importance that a finding thereon against the weight of the testimony is necessarily indicative of passion, do not constitute ground for setting aside the general verdict. *Kuehl v. Railway Co.*, 638.

VERIFICATION

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VERIFICATION.

Verification of information. It is presumed that a mayor before whom an information was verified, was within his jurisdiction when the oath was administered. *Town of Lovilia v. Cobb*, 557.

Erroneous use of words. The erroneous use of the word "defendant" for "plaintiff" in an instruction was not prejudicial, where, from the instructions as a whole or the paragraph in which the error occurred, the jury could not have been misled. *Roupke v. Grain Co.*, 632.

WAIVER.

Assessment. A property owner who has no knowledge that the cost of grading a street is to be assessed against his property does not waive objection thereto by failing to protest as the work goes on. *Gallaher v. Garland*, 206.

Default in interest payments. Acceptance and retention of past due interest on a note by the payees will preclude their assignees from enforcing a provision that upon the default in payment of interest the whole note shall become due, where the same was paid prior to notice of the assignment. *Hecker v. Boylan*, 162.

Election of remedies. In an action for the price of brick sold for sidewalk purposes, notice to the manufacturer in effect that the contractor would purchase brick elsewhere and charge the difference in cost to the manufacturer, he having failed to furnish the same according to contract, was not an election of remedies constituting a waiver of the contractor's right to recover damages upon the contract other than the difference in the cost of the brick. *Iowa Brick Mfg. Co. v. Herrick*, 721.

Expert evidence: Privilege. The fact that a physician, called by defendant to examine plaintiff immediately after his injury, testified on plaintiff's preliminary examination as to his competency under Code, section 4608, that he found plaintiff in an unconscious condition, substantially as he had stated in defendant's prior examination, did not amount to a waiver of plaintiff's right to object that the witness was within the privilege of the statute, as the preliminary examination disclosed no new facts and the same was not affirmative proof of any material fact for plaintiff. *Nugent v. Packing Co.*, 517.

Insurance: Waiver of conditions: Authority of local agent. Code, section 1750, providing that any officer, agent or other representative of an insurance company who may solicit in-

WAIVER Continued

TO

WARRANTIES

surance or transact the business generally of such company shall be held to be an agent with authority to transact all business within the scope of his employment, prohibits any limitations upon the authority of an agent having the powers enumerated in said section to transact all business within the apparent scope or usual extent of his employment; and under this section a local agent may waive the conditions of a policy and consent to an incumbrance upon the property. *Liquid Carbonic Acid Mfg. Co. v. Insurance Co.*, 225.

Jury trial. A defendant may waive a jury on the trial of an appeal from a conviction before a mayor for the violation of an ordinance. *Town of Lovilia v. Cobb*, 557.

Objection to juror. An objection to a juror because of his relation to the prosecuting witness in a criminal action, which becomes known to defendant's counsel during the trial, is waived by failure to call attention to the fact prior to the verdict. *State v. Pray*, 248.

WARRANTIES.

Burden of proof. Where the defendant in an action for breach of a warranty that the animal sold was a sure foal getter, pleads as a defense that its inefficiency was due to improper feed and care subsequent to the sale, he has the burden of proof on that issue. *Wingate v. Johnson*, 154.

Evidence of value. In an action for a breach of warranty in the sale of an animal, an inquiry of plaintiff whether he knew the fair market value of the animal had he been as plaintiff thought he was, while improper, is held not reversible error, as it appeared evident that plaintiff understood the question to be predicated upon defendant's representations. *Idem*.

The actual capacity of an animal for breeding purposes as demonstrated subsequent to a sale, may be shown in an action for the breach of a warranty that he was a sure foal getter. *Idem*.

Damages: Failure to pay taxes. Where it clearly appears from the deed itself that it was the intent of the parties to except taxes from the covenants of warranty, the grantee is not entitled to damages for the grantor's failure to pay the same. *Newburn v. Lucas*, 85.

Deeds: Breach of covenants: Damages. In an action for breach of covenants of warranty without reservation, a statement of the grantee's agent in producing the deed which was made to the grantor, that it was the custom of the grantor

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WARRANTS

to retain the crops where the conveyance was not made until after July 1st, upon which the vendor did not rely, and it further appearing that there was no agreement between the vendor and vendee that the crops should be reserved; held that the grantee was entitled to damages for failure to secure the crops, although the agent's statement may have been within the scope of his authority. *Idem.*

An action on the covenants of a deed cannot be defeated by parol evidence of the grantee's knowledge of an incumbrance. *Idem.*

Fire insurance; Incumbrance of property; Forfeiture. The mere accumulation of interest upon a mortgage of which an insurance company was advised at the time it accepted the risk, will not work a forfeiture of a policy under a clause warranting against incumbrances. *Fitzgibbons v. Insurance Co.*, 52.

Lien for damages. Where plaintiff and his grantor exchanged lands, and there was a breach of warranty as to the crops under the covenants in the grantor's deed, plaintiff was entitled to a lien for his damages on the land conveyed to the grantor. *Newburn v. Lucas*, 85.

Pleadings. Where the allegations of a petition indicated an intention to rely on a breach of warranty, the further allegation that defendant knew his statements to be false, did not convert the action into one for misrepresentation and fraud. *Wingate v. Johnson*, 154.

Sales: Breach of warranty. A representation that an animal is as sure a foal getter as ordinary animals of like character, is a warranty of reasonable service as a foal getter. *Idem.*

The actual capacity of an animal for breeding purposes as demonstrated subsequent to a sale, may be shown in an action for the breach of a warranty that he was a sure foal getter. *Idem.*

The verdict of \$300.00 damages for a breach of warranty in the sale of a jackass is held not excessive. *Idem.*

WARRANTS.

Illegal issue. Warrants issued in payment of material greatly in excess of the county's need, and at exorbitant prices, and under circumstances indicating collusion and fraud, should be cancelled by the court or reduced to the proper amount, though held by a third party. *Nelson v. Harrison County*, 436.

A contract prohibited by statute is void, and where county

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TO

WILLS

warrants in whole or in part are issued to members of a board of supervisors on either an express or implied contract to furnish the county materials or labor, the same should be cancelled or reduced by the court to the lawful amount, though in the hands of a third party *Idem*.

WATERS.

Surface water: Diversion. A county in the improvement of highways has no right to collect surface water either from the highways or from adjoining lands and turn it onto the land of another where it had not naturally flown. *Schofield v. Cooper*, 334.

WILLS.

Devise in lieu of dower: Election: Estoppel. Under the Code of 1873, the one-third interest of a widow in the real estate of her husband was not affected by his will giving her a life estate in lieu of dower, unless she consented thereto by an election entered of record within six months after notice to her by interested parties of the provisions of the will; nor would the management of the entire estate and receipt of rents and profits during her natural life work an estoppel. *Byerly v. Sherman*, 447.

Construction: Interest of heirs. Where a husband and wife having no children execute a joint will, the husband transferring to the wife the right and authority over their joint property, and in case of her survival a life interest therein with remainder "to be divided equally between our lawful heirs on both sides," the wife's heirs upon her death were entitled to share in one-half of the remaining property so devised by him *per stirpes* and not *per capita*. *Knutson v. Vidders*, 511.

Construction: Interest of widow. In the construction of the various provisions of the will and codicil in question, it is held that the widow as trustee held title to a certain eighty acres from which a bequest to one of the heirs was to be made equal to that of others, and that the balance was intended for the use of still other heirs to whom no specific devise of real estate was made. *Sperry v. Sperry*, 503.

Where a widow is made the sole beneficiary under her husband's will of his entire estate, she is entitled to all moneys collected for the wrongful death of testator, to the exclusion of their children, under Code, section 3313. *In re Estate of Cook*, 158.

Obliteration in part: Effect. Where a provision in a will direct-

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ing the executors to set aside a specific sum for a certain beneficiary has been partly obliterated, but is still legible, and is followed by a clause evidently relating to the same bequest which has been so obliterated as to be illegible, effect will be given to the legible provision without regard to the erased words. *Richardson v. Baird*, 408.

WITNESSES.

Sequestration of witnesses: Discretion of court. It was not an unreasonable exercise of discretion to permit the wife of a prosecuting witness to testify, after remaining in the court room during the examination of the other witnesses for the State, in violation of a sequestration order, it appearing that the sheriff did not enforce the order for the reason that she was the only lady witness. *State v. Pray*, 248.

WORDS AND PHRASES.

Erroneous use of words. The erroneous use of the word "defendant" for "plaintiff" in an instruction was not prejudicial, where, from the instructions as a whole or the paragraph in which the error occurred, the jury could not have been misled. *Roupke v. Grain Co.*, 632.



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